Supreme Court U.S
FILED
NOV 20 2006
OFFICE OF THE CLERK

No. 06-729

IN THE

SUPREME COURT OF THE UNITED STATES

CITY OF NEW YORK, NEW YORK CITY DEPARTMENT OF ENVIRONMENTAL PROTECTION, and JOEL A. MIELE, SR., Commissioner of Department of Environmental Protection,

Petitioners,

-v.-

CATSKILL MOUNTAINS CHAPTER OF TROUT UNLIMITED, LTD., THEODORE GORDON FLYFISHERS, INC., CATSKILL-DELAWARE NATURAL WATER ALLIANCE, INC., FEDERATED SPORTSMEN'S CLUBS OF ULSTER COUNTY, INC., RIVERKEEPER, INC., STATE OF NEW YORK, NEW YORK STATE DEPARTMENT OF ENVIRONMENTAL CONSERVATION, and ERIN M. CROTTY, Commissioner of the New York State Department of Environmental Conservation,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

PETITION FOR A WRIT OF CERTIORARI

LEONARD J. KOERNER,*
HILARY MELTZER,
WILLIAM S. PLACHE,
BRIDGET EICHINGER,**
of Counsel.
*Counsel of Record
**Awaiting Admission

MICHAEL A. CARDOZO,
Corporation Counsel of the
City of New York
100 Church Street
New York, NY 10007
(212) 788-1585

November 20, 2006

QUESTION PRESENTED

The United States Court of Appeals for the Second Circuit ("Second Circuit") has held that New York City's ("City's") transfer of drinking water from the Schoharie Reservoir to the Esopus Creek is subject to the National Pollutant Discharge Elimination System ("NPDES") permit program under the Federal Water Pollution Control Act (the "Clean Water Act" or "Act"). In *South Florida Water Management District v. Miccosukee Tribe of Indians*, this Court expressly declined to answer the question of whether the transfer of untreated water from one water body to a second is subject to the NPDES permit program. Since that decision, the United States Environmental Protection Agency ("EPA") has confirmed its longstanding view that such "water transfers" are not covered by the NPDES permit program in an Agency Interpretation, and has issued a Notice of Proposed Rulemaking indicating its intention to adopt a rule to that effect. The Second Circuit ignored EPA's pending proposed rule in the decision from which the City now seeks certiorari.

The question presented, which is of great national importance, is:

> Whether the conclusion of the United States Court of Appeals for the Second Circuit that water transfers are subject to the NPDES permit program is inconsistent with the language and structure of the Clean Water Act.

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

TABLE OF AUTHORITIES iv

PETITION FOR WRIT OF CERTIORARI 1

OPINIONS BELOW 1

JURISDICTION 1

STATUTORY PROVISIONS INVOLVED 1

STATEMENT OF THE CASE 2

A. Basis for Federal Jurisdiction 5

B. Overview of Relevant Statutory Scheme 5

C. New York City's Water Supply and the Shandaken Tunnel 6

D. History of this Litigation 7

E. Problems Arising from the Application of the NDPES Program to the Shandaken Tunnel 9

F. Regulatory Oversight and Permitting of the New York City Water Supply 12

REASON FOR GRANTING PETITION 14

REVIEW IS WARRANTED BECAUSE THE CONCLUSION OF THE SECOND CIRCUIT IS INCONSISTENT WITH THE PURPOSE, LANGUAGE, AND STRUCTURE OF THE CLEAN WATER ACT AND WILL WREAK HAVOC ON TRADITIONAL WATER MANAGEMENT ACROSS THE NATION 14

A. The Second Circuit Decision Is Inconsistent with the Plain Language of the Clean Water Act 16

B. The Clean Water Act Anticipates Alternative Mechanisms for Addressing Water Transfers 21

C. The Second Circuit's Decision Is Inconsistent with the Structure of the Clean Water Act 22

1. New York City's Transfer of Water through the Shandaken Tunnel Is a State Water Allocation 24

2. Application of the NPDES Permit Program in this Case Will Impair a State Water Allocation 25

D. The Second Circuit Should Not Have Ignored EPA's Pending Rulemaking Addressing Water Transfers 29

CONCLUSION 30

TABLE OF AUTHORITIES

Cases **Page**

Catskill Mountains Chapter of Trout Unlimited, Inc. v. City of New York, 273 F.3d 481 (2d Cir. 2001) .1, 6, 7, 8

Catskill Mountains Chapter of Trout Unlimited, Inc. v. City of New York, 244 F. Supp. 2d 41 (N.D.N.Y. 2003), *aff'd* in part, *remanded* in part, 451 F.3d 77 (2d Cir. 2006) ..... *passim*

Chevron, U.S.A., Inc. v. Natural Resources Def. Council, Inc., 467 U.S. 837 (1984).....28

Comm. to Save Mokelumne River v. E. Bay Mun. Util. Dist., 13 F.3d 305(9th Cir. 1993), *cert. denied* 513 U.S. 873 18

Dubois v. United States Dep't of Agric., 102 F.3d 1273 (1st Cir. 1996).....15

Friends of the Everglades v. S. Fla. Water Mgmt. Dist., No. 02-CV-80309 (S.D. Fla. Nov. 15, 2006).....28

In re Riverside Irrigation District, 1975 WL 23864 (Off. Gen. Couns., June 27, 1975).....4

Nat'l Wildlife Fed'n v. Consumers Power, 862 F.2d 580 (6th Cir. 1988) 18, 21

Nat'l Wildlife Fed'n v. Gorsuch, 693 F.2d 156 (D.C. Cir. 1982)..... *passim*

N. Plains Res. Council v. Fidelity Exploration and Dev. Co.,
325 F.3d 1155 (9th Cir.), *cert. denied sub nom. Fidelity Exploration and Dev. Co. v. N. Plains Res. Council*, 540 U.S. 967 (2003) 15

S.D. Warren v. Me. Bd. of Envtl. Prot.,
__ U.S. __, 126 S. Ct. 1843 (2006).....16, 18

South Fla. Water Mgmt. Dist. v. Miccosukee Tribe of Indians,
541 U.S. 95 (2004)..... *passim*

United States v. Mead Corp.,
533 U.S. 218 (2001).....28

United States v. Law,
979 F.2d 977 (4th Cir. 1992) 18

Statutes and Regulations

Federal Statutes

28 U.S.C. § 1254 (2006) 1

28 U.S.C. § 1331 (2006) 5

Clean Water Act, 33 U.S.C. §§ 1251-1387 (2006).... *passim*

Clean Water Act, 33 U.S.C. § 1251 2

Clean Water Act, 33 U.S.C. § 1251(a)(2).....15

Clean Water Act, 33 U.S.C. § 1251(g) 23, 26

Clean Water Act, 33 U.S.C. § 1311 2

Clean Water Act, 33 U.S.C. § 1311(a) 5, 16

Clean Water Act, 33 U.S.C. § 1311(b) 11, 15

Clean Water Act, 33 U.S.C. § 1313 2

Clean Water Act, 33 U.S.C. § 1313(c)(2)(A) 15

Clean Water Act, 33 U.S.C. § 1313(d)(1)(A) 21

Clean Water Act, 33 U.S.C. § 1313(d)(1)(B) 21

Clean Water Act, 33 U.S.C. § 1314 2

Clean Water Act, 33 U.S.C. § 1314(b) 15

Clean Water Act, 33 U.S.C. § 1314(f)(2)(F) 21

Clean Water Act, 33 U.S.C. § 1316(b) 10

Clean Water Act, 33 U.S.C. § 1319 .....2, 11

Clean Water Act, 33 U.S.C. § 1342 ..... *passim*

Clean Water Act, 33 U.S.C. § 1361(a) 28

Clean Water Act, 33 U.S.C. § 1362 ..... *passim*

Clean Water Act, 33 U.S.C. § 1365(a) 5

Clean Water Act, 33 U.S.C. § 1370 .....23, 28

Federal Regulations

40 C.F.R. § 122.3(f) (2006) 4

40 C.F.R. § 122.44(d)(1) (2006) 9

Surface Water Treatment Rule, 40 C.F.R. § 141 (2006) 10

State Statutes

N.Y. ENVTL. CONSERV. LAW § 15-0801 (McKinney 2006) 25

N.Y. ENVTL. CONSERV. LAW § 15-0801(2) (McKinney 2006) 10, 25

N.Y. ENVTL. CONSERV. LAW § 15-0805(1) (McKinney 2006) 14

N.Y. ENVTL. CONSERV. LAW § 17-0801 (McKinney 2006) 12

1905 N.Y. Laws Ch. 724 24

State Regulations

N.Y. COMP. CODES R. & REGS. tit. 6, § 670 (2003). 10, 14, 25

N.Y. COMP. CODES R. & REGS. tit. 6, § 703.2 (2003). 9

Other Authorities

Ann Klee & [illegible]amin Grumbles, United States Environm[illegible]l Protection Agency, *Agency Interpretation on Applicability of Section 402 of the Clean Water Act to Water Transfers* (Aug. 5, 2005) ..... *passim*

City Ordered to Pay $6 Million Penalty for Polluting Water: But Discharge at Esopus Creek Could Have Cost 10 Times More, 229 N.Y.L.J. 1 (2003) 8

H.R. REP. NO. 92-911 (1972) 17, 22

National Pollutant Discharge Elimination System (NPDES) Water Transfers Proposed Rule, 71 Fed. Reg. 32, 887 (proposed June 7, 2006) (to be codified at 40 C.F.R. pt. 122) ..... *passim*

N.Y. State Dep't of Envtl. Conservation, *State Pollution Discharge Elimination System Discharge Permit,* No. NY-0268151 (Effective Date Sept. 1, 2006) 13, 26, 27

Petition, *Catskill Mountains Chapter of Trout Unlimited, Inc. v. Sheehan*, (N.Y. Sup. Ct.) (No. 06-3601) 13, 26

PETITION FOR WRIT OF CERTIORARI

Petitioners City of New York, New York City Department of Environmental Protection, and Joel A. Miele, Sr. (collectively "the City") respectfully petition for a writ of certiorari to review the opinion of the United States Court of Appeals for the Second Circuit ("Second Circuit").

OPINIONS BELOW

The opinion of the Second Circuit (App. A1) is reported at 451 F.3d 77. The prior opinion of the court of appeals in this matter (App. A52) is reported at 273 F.3d 481. The opinion of the district court (App., A85) is reported at 244 F. Supp. 2d 41. The district court's partial summary judgment (App. A78) is unreported. The initial decision of the district court (App. A24) and that court's decision on plaintiffs' motion for reconsideration (App., A41) are unreported. The Second Circuit order denying rehearing and rehearing en banc (App. A139) is unreported. The district court's order and amended judgment on remand (App. A129) are unreported.

JURISDICTION

The Second Circuit issued the opinion from which the City seeks certiorari on June 13, 2006. Petitioners' motion for rehearing and rehearing en banc was denied on August 25, 2006. This Court has jurisdiction to review this decision under 28 U.S.C. § 1254.

STATUTORY PROVISIONS INVOLVED

The statutory provisions pertinent to this case, portions of the Clean Water Act, parts of 33 U.S.C.

§§ 1251, 1311, 1313, 1314, 1319, 1342, 1361, 1362, and 1370,[1] are set forth at A143 of the Appendix.

STATEMENT OF THE CASE

Transfers of untreated water are essential to the design and operation of public water supply systems as well as to local and regional flood control and water management efforts. Petitioners ask the Court to reverse a decision by the Second Circuit Court of Appeals, which is inconsistent with the language of the Clean Water Act and the federal government's long-established position on water transfers, and threatens the operation of all such systems.

In *South Florida Water Management District v. Miccosukee*, this Court explicitly recognized the importance of this issue and left the resolution "open" on remand in that case. 541 U.S. 95, 109 (2004). Petitioners respectfully urge this Court that the issue is now ripe for the Court's review.

Since Congress enacted the Clean Water Act in 1972, the United States Environmental Protection Agency ("EPA") has made clear that transfers of untreated water, in the context of routine water management activities, do not require federal NPDES permits. *See, e.g., National Wildlife Federation v. Gorsuch,* 693 F.2d 156, 167 (D.C. Cir. 1982) ("EPA's construction was made contemporaneously with the passage of the Act, and has been consistently adhered to since"). Virtually none of the millions of dams, levees, aqueducts, canals, and other structures used by the federal, state, and local governments for ordinary management of water, for public water supply,

---

[1] These provisions are also known as §§ 101, 301, 303, 304, 309, 402, 501, 502, and 510 of the Clean Water Act, respectively. We cite throughout to the statute as set forth in the United States Code.

flood control, commerce, and other governmental and public purposes, currently operates pursuant to such a federal permit. Many such water management structures predate the enactment of the Clean Water Act and have been in continuous operation since that time.

The federal government has unequivocally stated that such water transfers are not subject to the NPDES program. In 2003, the United States submitted an amicus brief to this Court supporting reversal of the Eleventh Circuit's decision in *Miccosukee*:

> Because the Act requires NPDES permits only where there is an addition of a pollutant "to navigable waters," the Government's approach would lead to the conclusion that such permits are *not* required when water from one navigable water body is discharged, unaltered, into another navigable water body.

Miccosukee, 541 U.S. at 105-06, describing the Brief for the United States as *Amicus Curiae* Supporting Petitioner ("U.S. Amicus Brief").

Similarly, in 2005, EPA, the agency charged by Congress with administration of the Clean Water Act, issued a memorandum directing its Regional Administrators that the NPDES permit program does not apply to water transfers (Ann Klee & Benjamin Grumbles, *Agency Interpretation on Applicability of Section 402 of the Clean Water Act to Water Transfers* (Aug. 5, 2005) [hereinafter *Water Transfer Interpretation* or *EPA Interpretation*]. App. A205. EPA noted that the Supreme Court not only left open the question whether water transfers were subject to NPDES permitting, but explicitly noted that EPA had not taken a position on the subject, and "essentially invited the Agency to speak on the broad legal

issue in the first instance."[2] EPA's assessment is based on a thorough and reasoned evaluation of statutory language and structure, legislative history, and case law, including this Court's decision in *Miccosukee* as well as the Second Circuit's October 2001 decision in this case. App. A208-A209 & A220. On June 7, 2006, consistent with the Water Transfer Interpretation, EPA issued a notice of proposed rulemaking indicating its intention to adopt a rule clarifying that water transfers are not subject to the NPDES program. National Pollutant Discharge Elimination System (NPDES) Water Transfers Proposed Rule, 71 Fed. Reg. 32,887 (proposed June 7, 2006) (to be codified at 40 C.F.R. pt. 122). App. A170.

Less than a week later, the Second Circuit issued the decision from which petitioners now seek certiorari, ignoring the proposed rule entirely and according no deference to the views expressed by the federal government, either in its *amicus* brief in *Miccosukee* or in the Water Transfer Interpretation.

---

[2] (App., memo at 14.) In *Miccosukee*, this Court noted a claim that EPA had not consistently endorsed the "unitary waters" theory, citing an amicus brief submitted by former EPA Administrator Browner in support of respondents ("Browner Amicus Brief"). The Browner Amicus Brief cites a 1975 opinion of the EPA Office of the General Counsel with dicta concerning hypothetical inter-basin transfers of pollutants. 541 U.S. at 107. But the issue of inter-basin transfers was not raised in any of the seventeen questions before EPA in connection with that opinion. The opinion dealt with numerous questions relating to the applicability of the NPDES provisions to irrigation return flows. *In re Riverside Irrigation Dist.*, 1975 WL 23864 (Off. Gen. Couns., June 27, 1975). In 1977, Congress made such flows exempt from NPDES permits. 33 U.S.C. § 1362(14). EPA adopted regulations to the same effect. 40 CFR § 122.3(f). In addition, the Agency Interpretation explicitly supersedes the 1975 opinion. App. A208-A209.

As explained below, the Second Circuit's holding disrupts basic governmental water management functions nationwide by imposing the rigid legal framework established by Congress for regulating discharges of industrial and municipal wastewater to transfers of untreated water.

A. Basis for Federal Jurisdiction

The District Court had jurisdiction of this case pursuant to 28 U.S.C. § 1331, as a civil action raising questions of federal law, and pursuant to 33 U.S.C. § 1365(a), as a citizen suit alleging a violation of an effluent standard or limitation under the Clean Water Act.

B. Overview of Relevant Statutory Scheme

The Clean Water Act provides that unless a National Pollutant Discharge Elimination System ("NPDES") permit is obtained, "the discharge of any pollutant by any person shall be unlawful." 33 U.S.C. §§ 1311(a), 1342. The term "discharge of a pollutant" means "any addition of any pollutant to navigable waters from any point source." 33 U.S.C. § 1362(12). The issue at the heart of this case is whether, when natural, untreated water is moved from a reservoir created by impounding a stream into a second stream (an inter-basin transfer), a pollutant has been "added" to navigable waters within the meaning of the Act.

As EPA has noted,

> water transfers are unlike the types of discharges that were the primary focus of Congressional attention in 1972. Discharges of pollutants covered by section 402 are subject to "effluent" limitations. Water transfers, however, are not like effluent from

> an industrial, commercial, or municipal operation. Rather than discharge effluent, water transfers release one navigable water into another. There is no indication that Congress intended to subject the navigable waters themselves to effluent limitations.

App. A216-17.

C. New York City's Water Supply and the Shandaken Tunnel

New York City owns and operates a water supply system in upstate New York. The facility at issue here, the Shandaken Tunnel, transfers water from one of the two reservoirs that comprise New York City's Catskill water supply system, the Schoharie, to the other, the Ashokan reservoir. *Catskill Mountains Chapter of Trout Unlimited, Inc. v. City of New York*, 273 F.3d 481, 484 (2d Cir. 2001). Specifically, the Tunnel moves water from the Schoharie reservoir to the Esopus Creek, the main tributary to the Ashokan. *Id.* New York City's average demand for water is about 1.2 billion gallons per day, of which approximately 16% originates in the Schoharie Reservoir. *Catskill Mountains Chapter of Trout Unlimited, Inc. v. City of New York*, 244 F. Supp. 2d 41, 46 (N.D.N.Y. 2003); *see also* Joint Appendix before the Second Circuit, Docket No. 03-7203 ("Second Circuit App.") at A321, 909-12. The Shandaken Tunnel came on line in 1924. *Catskill Mountains*, 244 F. Supp.2d at 46. Aside from the Shandaken Tunnel, there is no other way to move Schoharie water to New York City. *Catskill Mountains*, 273 F.3d at 484.

New York City does not treat water collected in the Schoharie reservoir before diverting it through the Shandaken Tunnel. *Catskill Mountains*, 244 F. Supp. 2d at 46. However, the mountains surrounding the Schoharie

reservoir are characterized by extensive deposits of silts and clays, which are often exposed by erosion, particularly during storms. *Id.* As a result, water in the Schoharie reservoir and released from the Tunnel regularly contains elevated levels of suspended solids, and thus turbidity. *Id.* Based on extensive research and analysis, New York City believes that no matter what reasonable structural and programmatic measures are implemented, the diversions through the Shandaken Tunnel will continue, on a regular basis, to be visibly more turbid than the receiving water, the Esopus Creek.[3]

D. History of this Litigation

The opinion of the Second Circuit from which the City seeks certiorari, *City of New York v. Catskill Mountains Chapter of Trout Unlimited, Inc.*, 451 F.3d 77 (2d Cir. 2006), affirmed an earlier Second Circuit opinion in this case, 273 F.3d 481, holding that the City needs NPDES permit under the Clean Water Act to transfer natural, untreated water from one of its drinking water reservoirs to the main tributary of another of its reservoirs.

Respondents Catskill Mountains Chapter of Trout Unlimited, Inc., Theodore Gordon Flyfishers, Inc., Catskill-Delaware Natural Water Alliance, Inc., Federated Sportsmen's Clubs of Ulster County, Inc., and Riverkeeper Inc. (collectively, "plaintiffs") filed a Clean Water Act

---

[3] *See* Affidavit of Michael A. Principe, Ph.D., sworn to April 18, 2002, Second Circuit App. at A915-916 [hereinafter, *Affidavit*]; *see also*, *e.g.*, Direct Testimony of Dr. Principe, Second Circuit App. at A990-63. These statements of Dr. Principe, then-Deputy Commissioner for the NYCDEP Bureau of Water Supply, were made before the conclusion of a four-year study of turbidity in the City's Catskill Water Supply System. The study has confirmed Dr. Principe's expectations. The Phase I and Phase II Final Reports of the Catskill Turbidity Control Study, dated December 31, 2004 and September 30, 2006, respectively, will be made available to this Court upon request.

citizen suit against the City on March 31, 2000, alleging that the City's operation of its Shandaken Tunnel, a key component of its drinking water supply system that has been in operation since 1924, constituted a "discharge of pollutants" within the meaning of the Act. On October 4, 2000, the United States District Court for the Northern District of New York ("District Court") dismissed the action, holding that transfers of untreated water do not constitute discharges of pollutants for purposes of the Act. App. A38-39.

Plaintiffs appealed, and the Second Circuit reversed and remanded. *Catskill Mountains,* 273 F.3d 481. On June 4, 2002, the District Court granted plaintiffs' motion for partial summary judgment on the sole question of the City's liability under the Clean Water Act. App. A83.

Following a trial on the amount of penalties, if any, and the appropriate remedy, the District Court issued an order, dated February 6, 2003, 244 F. Supp. 2d 41, which, as modified by an order dated March 12, 2003, held the City liable for statutory penalties in the amount of $5,749,000. Those penalties, for operating a water supply facility as it had been operated for nearly eighty years, including over thirty years after the adoption of the Clean Water Act, are believed to be the largest Clean Water Act penalties ever assessed against a municipality.[4] The District Court also made respondent the New York State Department of Environmental Conservation ("NYSDEC") a third-party defendant pursuant to the All Writs Act, and directed NYSDEC to make a determination concerning, a

---

[4] *City Ordered to Pay $6 Million Penalty for Polluting Water: But Discharge at Esopus Creek Could Have Cost 10 Times More*, 229 N.Y.L.J. 1 (2003).

State Pollutant Discharge Elimination System ("SPDES")[5] permit for the City's Shandaken Tunnel within 18 months. *Catskill Mountains*, 244 F. Supp. 2d at 55.

The City appealed. In the decision from which the City now seeks certiorari, the Second Circuit affirmed in part and remanded for resolution of a minor error in the calculation of penalties. The Second Circuit denied the City's petition for rehearing and rehearing en banc.[6] On remand, the District Court reduced the penalty amount to $5,225,000.[7]

E. Problems Arising from the Application of the NDPES Program to the Shandaken Tunnel

Clean Water Act permits must include effluent limits to "achieve water quality standards . . . including State narrative criteria for water quality." 40 C.F.R. § 122.44(d)(1). The state water quality standard for discharges of turbid waters in New York is: "no increase that will cause a substantial visible contrast to natural conditions." N.Y. COMP. CODES R. & REGS. tit. 6, § 703.2 (2003). Because it is unlikely that the diversions through the Shandaken Tunnel will ever consistently meet this standard, requiring a NPDES permit for the diversion of water through the Tunnel poses a number of serious problems, affecting not only the public health and welfare, but the environment itself.

---

[5] The NPDES program is implemented in New York as the State Pollutant Discharge Elimination System, or "SPDES," program, by NYSDEC.

[6] The denial of that petition is unreported and appears at p. __ of the Appendix.

[7] The District Court Order and Amended Judgment are unreported and appear at p. __ of the Appendix.

First, the City moves water through the Shandaken Tunnel to serve the vital public purpose of providing a safe and adequate water supply. NPDES permits, which were designed for discharges of wastewater,[8] and which require strict compliance with effluent limits, are not compatible with diversions of natural, untreated water such as the flows through the Shandaken Tunnel. The City often needs to make releases through the Shandaken Tunnel notwithstanding naturally occurring elevated turbidity levels that cause a "substantial visible contrast" with the waters in the Esopus Creek. For example, releases may be necessary to maintain an adequate supply of water to meet demand, or to address or prevent a drought. Second Circuit App. at A334; A916. The City is also required, under State law, to transfer water in specified amounts and at specified times, to advance recreational use of the Esopus Creek. N.Y. COMP. CODES R. & REGS. tit. 6, Part 670 (2003).

The transfers through the Shandaken Tunnel, as well as the activities of other municipalities that divert untreated natural water for similarly essential public purposes, including flood control, irrigation, and water supply, are already regulated under federal and state laws and regulations. *See, e.g.*, Surface Water Treatment Rule, 40 C.F.R. § 141.71(b)(2); N.Y. ENVTL. CONSERV. LAW § 15-0801(2), discussed below. The decision of the Second Circuit subjects them to yet another layer of regulation under the ill-suited NPDES permit program, which: is designed for industrial and municipal discharges of waste where treatment facilities are presumed (*see, e.g.*, 33 U.S.C. § 1316(b)); is premised on unwavering adherence to

---

[8] *National Wildlife Federation v. Gorsuch*, 693 F.2d at 175 ("Throughout its consideration of the Act, Congress' focus was on traditional industrial and municipal wastes; it never considered how to regulate facilities such as dams which indirectly cause pollutants to enter navigable upstream water and then convey these polluted waters downstream").

effluent limits (33 U.S.C. §§ 1311(b)(1)(C), 1319(a) and (b)); and imposes harsh criminal penalties and, under strict liability, civil penalties, for violations. 33 U.S.C. 1319(c) and (d). As a result, the City and other operators could be forced not only to reduce or even eliminate these transfers whenever civil or criminal liability may ensue, but also may be enjoined from making the beneficial transfers because of the rigid nature of the NPDES permit scheme. 33 U.S.C. § 1319(b). The health and welfare of the public – and of the nine million citizens who rely on the City's water supply system – may necessarily be affected under these circumstances.

Moreover, in many cases, historic diversions or transfers of natural, untreated water continue to be vital to sustaining a healthy aquatic environment in the receiving water body. For instance, the generally cold water from the Shandaken Tunnel is essential to maintaining the trout fishery in the Esopus Creek, especially during the summer when temperatures in the Creek rise and "natural" flow (without the Tunnel's contribution) is diminished. *See, e.g., Catskill Mountains,* 244 F. Supp. 2d at 50.[9] If the reasoning of the Second Circuit is upheld, operators of water supply or flood control infrastructure may be forced to alter or even eliminate diversions or transfers of water in order to avoid liability. The result in many cases will be a net detriment to ecosystems that have come to depend on such diverted flows. Such a result runs counter to the goals of the Clean Water Act.

The biochemical constituents of distinct, untreated bodies of water are inevitably different from one to another, whether the water bodies are in naturally connected

---

[9] Indeed, as noted below, New York State requires the City to release specified volumes of water from the Shandaken Tunnel pursuant to its authority to protect natural resources and recreational use of water.

watersheds or not. Thus, diversions or transfers of untreated water are likely to involve transfers of water containing certain different constituents, and constituents in different concentrations, than they may occur in the receiving waters, such as turbidity in this case or the nutrients at issue in *Miccosukee*. Such incidental movements of the natural constituents of untreated water should not be considered "additions" of pollutants requiring NPDES permits under the Clean Water Act.

F. Regulatory Oversight and Permitting of the New York City Water Supply

DEP has operated the Catskill and Delaware water supply systems under a series of Filtration Avoidance Determinations, or "FADs," issued by the U.S. Environmental Protection Agency ("EPA") pursuant to the Surface Water Treatment Rule (40 C.F.R. Part 141) since January 1993. *See Catskill Mountains,* 244 F. Supp. 2d at 53, note 13) Since EPA's first Filtration Avoidance Determination in January 1993, EPA has imposed, and DEP has satisfied, requirements related to turbidity in the Catskill System, under the federal Safe Drinking Water Act and the Surface Water Treatment Rule. *Id.*

Despite EPA's having known that turbid water is released through the Shandaken Tunnel, and despite EPA's requirement that the City analyze and address turbidity in those releases, EPA has never sought to regulate, and has never regulated, levels of turbidity and suspended solids in the Tunnel releases under the Clean Water Act. *Catskill Mountains*, 244 F. Supp. 2d at 53. Similarly, prior to the Second Circuit's October 22, 2001 decision in this case, NYSDEC, the agency with delegated authority to administer the Act in New York State (*see, e.g.*, N.Y. ENVTL. CONSERV. LAW § 17-0801), never applied the Clean Water Act permitting provisions to the Tunnel transfers. *Id.* Not until the City approached NYSDEC

seeking to obtain a permit for the transfer in response to the Second Circuit's October 22, 2001 decision did permitting the Tunnel discharge become an issue for NYSDEC.

Ultimately, NYSDEC issued a permit, effective September 1, 2006, which provides for a number of specific exemptions from water quality standards to address circumstances where transfers are vital to public water supply or are required by the State to promote a healthy aquatic environment in, and recreational use of, the Esopus. [10] N.Y. State Dep't of Envtl. Conservation, *State Pollution Discharge Elimination System Discharge Permit*, No. NY-0268151, 4-5 (Effective Date Sept. 1, 2006) (hereinafter "*SPDES Permit*"). Although the City believes the exemptions are rational and consistent with the purposes of the Clean Water Act and the vital importance of the Shandaken Tunnel, they are novel in terms of the Act and the historic form of NPDES permits issued in New York State. The same organizations that filed this case against the City have challenged the permit in a New York State court proceeding, claiming that the Clean Water Act mandates strict adherence to the water quality standards at all times, and does not allow the exemptions provided in the permit. Petition, *Catskill Mountains Chapter of Trout Unlimited, Inc. v. Sheehan*, (N.Y. Sup. Ct.) (No. 06-3601) [hereinafter *Catskill Mountains v. Sheehan*].

[10] The SPDES Permit will be made available to this Court upon request.

REASONS FOR GRANTING PETITION

REVIEW IS WARRANTED BECAUSE THE CONCLUSION OF THE SECOND CIRCUIT IS INCONSISTENT WITH THE PURPOSE, LANGUAGE, AND STRUCTURE OF THE CLEAN WATER ACT AND WILL WREAK HAVOC ON TRADITIONAL WATER MANAGEMENT ACROSS THE NATION

This Court should grant review because the Second Circuit's decision misinterprets the plain language of the Clean Water Act, misconstrues this Court's decision in *Miccosukee*,[11] ignores the views of the agency to which Congress granted the authority to interpret the Clean Water Act, and threatens to impair traditional water management functions throughout the nation.

The Shandaken Tunnel moves water for the benefit of nearly half the population of New York State. *Catskill Mountains,* 244 F. Supp. 2d at 46. Because of the concurrent benefit it provides to the trout fishery in the receiving water, the City is required to divert water through the Shandaken Tunnel under New York State law. N.Y. ENVTL. CONSERV. LAW § 15-0805(1); N.Y. COMP. CODES R. & REGS. Tit. 6, Part 670 (2003). The Second Circuit decision threatens these essential allocations of water for public health and safety, for natural resources, and for recreational uses – the very water uses the Clean Water Act

---

[11] Indeed, the Second Circuit misquoted this Court's decision, attributing language about whether EPA's position on this issue has been consistent since 1972 to the Court rather than to an *amicus*. *Catskill Mountains,* 451 F.3d at 83, *quoting Miccosukee*, 541 U.S. at 107.

is intended to protect. *See, e.g.*, 33 U.S.C. §§ 1251(a)(2), 1313(c)(2)(A).

The NPDES permit program is designed to ensure adequate removal of pollutants before wastewater is disposed of into the waters of the United States. It is premised on existence of, and the need for, treatment facilities capable of such pollutant removal. *See, e.g.*, 33 U.S.C. §§ 1311(b), 1314(b). In sharp contrast, the Shandaken Tunnel diverts natural water – not for disposal of waste but for public use and habitat protection.

Other than the Second Circuit's decisions in this case, no court has ever considered diversions of drinking water toward water supply consumers, for the purpose of moving such drinking water, to be subject to the NPDES program.[12]

---

[12] *Compare Dubois v. United States Dep't of Agric.*, 102 F.3d 1273 (1st Cir. 1996) (discharge of water after commercial exploitation); *N. Plains Res. Council v. Fidelity Exploration and Dev. Co.*, 325 F.3d 1155 (9th Cir.), *cert. denied sub nom. Fidelity Exploration and Dev. Co. v. N. Plains Res. Council*, 540 U.S. 967 (2003) (the discharge of groundwater pumped into surface waters, during the process of mining, required a NPDES permit). In contrast to the municipal water management activities at issue in this case, *Dubois* defendant Loon Mountain Recreation Corporation was processing the diverted water through snowmaking equipment and *Northern Plains* defendant Fidelity Exploration and Development Company was extracting groundwater in connection with mining operations. Significantly, both companies had no further use for the water at the completion of their processes, and were discharging it as wastewater. The City, in contrast, transfers water through the Shandaken Tunnel not as wastewater, but for consumption.

The First Circuit found it significant in *Dubois* that the water was "commercially exploited" between the time of its intake into the snowmaking equipment and the time it was released. 102 F.3d at 1297. The commercial exploitation meant that water was removed from a pond and two other sources, then processed in snowmaking equipment, and then released back into the pond. *Id.*

To apply the NPDES program to water transfers could induce water managers to limit important transfers to avoid penalties, or could require a massive, costly, and unnecessary treatment facility at each of the myriad water transfer points across the nation that direct water to areas of need and away from areas in danger of flooding. This Court should grant review in this case to prevent such absurd results.

A. The Second Circuit Decision Is Inconsistent with the Plain Language of the Clean Water Act

The Clean Water Act provides that unless a discharge permit is obtained, "the discharge of any pollutant by any person shall be unlawful." 33 U.S.C. §§ 1311(a), 1342. "Discharge of a pollutant" is defined as "any addition of any pollutant to navigable waters from any point source." 33 U.S.C. § 1362(12). Focusing its attention on a single word in this definition ("addition") rather than looking at the definition as a whole, the Second Circuit concluded that the mere transfer of natural, untreated water requires a discharge permit. As this Court recently found, however, close attention must be paid to the language of the Clean Water Act, "where technical definitions are worked out with great effort in the legislative process." *S.D. Warren v. Me. Board of Environmental Protection*, __ U.S. __, 126 S.Ct. 1843,

---

The underlying water discharge in *Northern Plains* is even more distinct from the transfers at issue in this case. In determining that groundwater was a "pollutant" in *Northern Plains*, the Ninth Circuit emphasized that, because defendant was engaged in commercial activity, the groundwater qualified as "industrial waste." 325 F.3d at 1161.

Distinguishing between governmental water management activities and commercial exploitation of water is not only consistent with the goals and policy of the Clean Water Act but is required under the Act. 33 U.S.C. §§ 1251(b) and (g).

1849-50 (2006) (quoting the Act's legislative history, "'[I]t is extremely important to an understanding of [§ 402] to know the definition of the various terms used and a careful reading of the definitions . . . is recommended. Of particular significance [are] the words 'discharge of pollutants'"). H.R. REP. NO. 92-911, at 125 (1972).

A discharge of a pollutant is "*any* addition of *any* pollutant to navigable waters from *any* point source." 33 U.S.C. § 1362(12) (emphasis added). In that definition, the modifier "any" is notably missing only from the term "navigable waters." The term "navigable waters," in turn, is defined as "*the* waters of the United States." 33 U.S.C. § 1362(7) (emphasis added). Read together, these definitions require a permit when there is any addition of any pollutant to the waters of the United States from any point source.[13] As numerous courts have found, a pollutant cannot be "added" once it is already in "the waters of the United States."[14]

In *National Wildlife Federation v. Gorsuch*, the District of Columbia Circuit determined that dam-induced water quality changes are not "addition[s] that trigger the NPDES permit requirement" because no pollutant was physically introduced "into the water from the outside world." 693 F.2d 156, 164, 175 (D.C. Cir. 1982). Once a

---

[13] The use of the collective term "waters," like the use of the definite article and the absence of the adjective "any," suggests that an "addition" requiring a permit would be an addition to the system of navigable waters as a whole, rather than the incidental transfer of pollutants from one body of water to another.

[14] This is also the view of the U.S. Government. *Miccosukee*, 541 U.S. at 106 ("The Government contends that the absence of the word 'any' prior to the phrase 'navigable waters' in § 1362(12) signals Congress' understanding that NPDES permits would not be required for pollution caused by the engineered transfer of one 'navigable water' into another").

pollutant already exists in navigable water, there can be no subsequent introduction of that pollutant, even if that water is transferred from one body of navigable water to another. Similarly, in *National Wildlife Federation v. Consumers Power*, the Sixth Circuit held that the release of fish and fish parts from a hydroelectric plant downstream from the source of the intake water did not constitute a "discharge of pollutants" because it simply moved pollutants already in the water. 862 F.2d 580 (6th Cir. 1988). "These cases [*Gorsuch* and *Consumers Power*] examined the CWA as a whole and concluded that it was more consistent with the overall statutory scheme to subject water flow diversions to State nonpoint planning processes rather than the NPDES program." App. A224. Other courts have also recognized the principle that an addition of pollutants to navigable waters does not occur where pollution is merely passed "from one body of navigable water to another." *See, e.g., Comm. to Save Mokelumne River v. E. Bay Mun. Util. Dist.*, 13 F.3d 305, 308 (9th Cir. 1993), *cert. denied* 513 U.S. 873; *United States v. Law*, 979 F.2d 977, 979 (4th Cir. 1992) ("[W]here 'pollutants' exist[] in waters of the United States before contact with these facilities, the mere diversion in the flow of waters [does] not constitute 'additions' of pollutants to water").

This Court made clear in *S.D. Warren v. Maine Board of Environmental Protection* that the "waters of the United States" remain national waters, even when they are moved or manipulated. __ U.S. __, 126 S.Ct. 1843 (2006). In rejecting the notion that when water is impounded, it "loses its status as waters of the United States ... and becomes an addition to waters of the United States when redeposited into the river," this Court explained that one cannot "denationalize national waters by exerting private control over them." *Id.* 126 S.Ct. at 1849 (internal citations omitted).

This reading – known, perhaps unfortunately,[15] as the "unitary waters" approach – is consistent not only with the statutory language but also with how the Clean Water Act has been administered since it was enacted. The focus of the NPDES program has long been to ensure that sewage and industrial waste are treated adequately prior to being discharged or added to the nation's waters. *See, e.g., Gorsuch*, 693 F.2d at 175. *See also Miccosukee*, 541 U.S. at 105.

The Second Circuit erred by ignoring everything but the isolated word "addition" in interpreting the statute:

> We decided that "addition" means the introduction into navigable water from the "outside world," with the outside world being defined as "any place outside the particular water body to which pollutants are introduced."

City of New York, 451 F.3d at 81. There is nothing in the Act to suggest that the relevant recipient of an "addition" is "the particular water body to which pollutants are introduced." On the contrary, the Act refers to an addition "to navigable waters," or to "the waters of the United States."

Similarly, the definition requires that the pollutants be added "from a point source." As explained below, to the extent Congress addressed diversions of water at all, it treated diversions as "nonpoint sources" rather than as "point sources."[16] A "point source" is defined as "any

---

[15] We do not argue that the waters of the United States are themselves a single, interconnected entity; rather, the "waters of the United States" form a collective body that constitutes the relevant receiving water for purposes of this definition.

[16] *See* section B., *infra*.

discernible, confined and discrete conveyance, including but not limited to any pipe, . . . through which pollutants are or may be discharged." 33 U.S.C. § 1362(14). While "nonpoint source" is not defined in the Act, EPA has explained that "[the term] is defined by exclusion and includes all water quality problems not subject to § 402." *Gorsuch*, 693 F.2d at 166.

Indeed, it is not at all clear that the constituents at issue in this case are "pollutants" for purposes of the definition of "discharge of a pollutant."

> The term "pollutant" means dredged spoil, solid waste, incinerator residue, sewage, garbage, sewage sludge, munitions, chemical wastes, biological materials, radioactive materials, heat, wrecked or discarded equipment, rock, sand, cellar dirt and industrial, municipal, and agricultural waste discharged into water.

33 U.S.C. § 1362(6). Neither turbidity nor sediments is listed in this definition. The list instead focuses on waste materials that might be disposed of into water, rather than naturally occurring constituents of water being moved for purposes of public health and safety, protection of natural resources, and recreation.[17]

---

[17] The definitions of "point source" and "pollutant," integral to the definition of the term "discharge of a pollutant," both circularly use the word "discharge." The context – particularly in the definition of "pollutant," which lists an array of waste materials, suggests the ordinary meaning of the word "discharge," – that is, a casting off or unloading. The phrase "addition of a pollutant" in 33 U.S.C. § 1362(12) should thus also be considered in this context: a pollutant is "added" to the waters of the United States for these purposes only if it is discharged as waste. By focusing exclusively on the word "addition," the Second Circuit overlooked the usage of the word "discharge" throughout these definitions.

By substituting its own reading of the isolated word "addition" for Congress' explanation of when an "addition" constitutes a "discharge of pollutants" – i.e. when the addition is of "any pollutant" from "any point source" to "the waters of the United States" – the Second Circuit ignored the plain language of the statute.[18]

B. The Clean Water Act Anticipates Alternative Mechanisms for Addressing Water Transfers

The Clean Water Act provides that "changes in the movement, flow, or circulation" of navigable waters, including those caused by "flow diversion facilities," are to be addressed as nonpoint sources of pollution. 33 U.S.C. § 1314(f)(2)(F). Facilities that change the flow of water, even if the facility causes a change in the receiving water's quality, are considered nonpoint sources, and should be regulated as non-point sources rather than under the NPDES permit program set forth in 33 U.S.C. § 1342. *See Consumers Power*, 862 F.2d at 588 ("This supports . . . the view that generally water quality changes caused by the existence of dams and other similar structures were intended by Congress to be regulated under 'nonpoint source' category of pollution") (*citing Gorsuch*, 693 F.2d at 177). *See also* App. A215-16.

---

[18] The language elsewhere in the statute makes clear that when Congress felt it appropriate to address particular water bodies, or portions of specific water bodies, it did so explicitly, and did not use the defined term "navigable waters." *See, e.g.*, provisions concerning the identification of specific water bodies or segments not meeting water quality standards, 33 U.S.C. §§ 1313(d)(1)(A) ("Each State shall identify *those waters within its boundaries*...") and (B) ("Each State shall identify *those waters or parts thereof within its boundaries*...") (emphasis added).

This reading is consistent with the legislative history of this provision. The House Committee report on Section 304(f) states:

> The Committee . . . expects the Administrator to be most diligent in gathering and distribution of the guidelines for the identification of nonpoint sources and the information on processes, procedures, and methods for control of pollution from such nonpoint sources as . . . natural and manmade changes in the normal flow of surface and groundwater.

H.R. Rep. No. 92-911 at 109 (1972). Accordingly, "the legislative history of the Act discusses water flow management activities only in the context of the nonpoint source program . . . rather than an area to be regulated under section 402." App. A218.

C. The Second Circuit's Decision Is Inconsistent with the Structure of the Clean Water Act.

The Clean Water Act makes clear that Congress did not intend to interfere with state water allocation. Section 101(g), entitled "Authority of States Over Water," states:

> It is the policy of Congress that the authority of each State to allocate quantities of water within its jurisdiction shall not be superseded, abrogated or otherwise impaired by this chapter. It is the further policy of Congress that nothing in this chapter shall be construed to supersede or abrogate rights to quantities of water which have been established by any state.

33 U.S.C. § 1251(g). Similarly, Section 510 of the Act, entitled "State Authority," further affirms Congress' intention that the Clean Water Act NPDES permitting provision not affect allocation of water within a state.

> Except as expressly provided in this chapter, nothing in this chapter shall ... be construed as impairing or in any manner affecting any right or jurisdiction of the States with respect to the waters ... of such States.

33 U.S.C. § 1370. EPA concluded that these sections "support the notion that Congress did not intend administration of the CWA to unduly interfere with water resource allocation." *See* App. A214. Similarly, this Court in *Miccosukee* did not limit its inquiry, as the Second Circuit did in this case, to a single word in a single definition, but recognized that the analysis must consider the Act as a whole. Indeed, this Court confirmed in *Miccosukee* that if the ability to transfer water is impaired through the application of the NPDES program, Section 101(g) of the Act would be violated.

> Many of these diversions might also require expensive treatment to meet water quality criteria. It may be that construing the NPDES program to cover such transfers would therefore raise the costs of water distribution prohibitively, and violate Congress' specific instruction that "the authority of each State to allocate quantities of water within its jurisdiction shall not be superseded, abrogated or otherwise impaired" by the Act.

Miccosukee, 541 U.S. at 108.

The NPDES permit program, which was crafted to suit traditional discharges of pollutants from municipal wastewater and industrial sources, is predicated on the existence of a treatment facility that can be operated or modified to remove pollutants in order to meet appropriate permit limits. For this reason, the NPDES program is not appropriate for most transfers of untreated water: treatment facilities neither are nor should be required at water transfer points.

1. New York City's Transfer of Water through the Shandaken Tunnel Is a State Water Allocation

The City's water supply system is operated pursuant to New York State law to provide water to New York City and upstate communities. The creation of the upstate reservoirs was authorized under the Water Supply Act,

> An Act to provide for an additional supply of pure and wholesome water for the city of New York; and for the acquisition of lands or interest therein, and for the construction of the necessary reservoirs, dams, aqueducts, filters, and other appurtenances for that purpose; and for the appointment of a commission with the powers and duties necessary and proper to attain these objects.

1905 N.Y. Laws Ch. 724. Among other things, all plans for the reservoir system were required to be "submitted to and approved by the state water supply commission." *Id.* at § 46. While the State retains certain authority over the City's water supply system, the Water Supply Act represents a delegation of water rights to the City by the State Legislature.

New York State continues to be closely involved in allocation of water in connection with the City's water supply system:

> It is hereby declared to be the policy of this state that the volume and rate of change of volume of releases of water from [reservoirs within the New York City system] should be regulated to protect and enhance the recreational use of waters affected by such releases while ensuring and without impairing an adequate supply of water for power production or for any municipality which uses water from such reservoirs for drinking and other purposes.

N.Y. ENVTL. CONSERV. LAW § 15-0801(2). With respect to the Shandaken Tunnel in particular, "[t]he Commissioner is authorized and directed to promulgate rules and regulations ... for releases from Schoharie reservoir through the Shandaken tunnel." *Id.*, § 15-0805(1).[19]

2. Application of the NPDES Permit Program in this Case Will Impair a State Water Allocation

The City was required to obtain a SPDES permit for transfers from the Shandaken Tunnel as a result of the Second Circuit's decisions in this case, thus subjecting the movement of water within its supply system to additional regulation, beyond that which historically has applied. The permit includes limitations on the level of turbidity and other constituents in water diverted through the Shandaken Tunnel, and thus impedes the City's ability to use the water the State has allocated it for its water supply. *See SPDES*

---

[19] NYSDEC's release requirements for the Shandaken Tunnel are set forth at N.Y. COMP. CODES R. & REGS. tit. 6, Part 670.

Permit at 3. As noted above, it is unlikely that the City can significantly reduce the turbidity levels in the Schoharie reservoir;[20] accordingly, it may be that the City can comply with these permit limits only by curtailing flows through the Tunnel, and impairment of the State's water allocation to the City.

The Second Circuit viewed exemptions from the turbidity limits in the SPDES permit that were designed to prevent water shortages, among other things, as a solution to the inherent inconsistency between the allocation of water in the City's water supply system and the NPDES program. *City of New York,* 451 F.3d at 86. The exemptions are not an adequate solution to the underlying conflict with Congress' expressed intention not to interfere with state water allocations. 33 U.S.C. §§ 1251(g) and 1370. First, the plaintiffs in this litigation have challenged the legality of these exemptions in a case currently pending in New York State Supreme Court. Petition in *Catskill Mountains v. Sheehan, supra.* In that case, citing the Clean Water Act and the implementing federal regulations as well as their New York State counterparts, plaintiffs claim that under the Clean Water Act, NYSDEC

> is not authorized to issue a SPDES permit if the permit allows for violations of water quality standards at any time.... [nor may NYSDEC] provide exemptions in a SPDES permit which would, at any time, allow the permitee's discharge to violate applicable water quality standards.

Id. at ¶¶ 44-45. *See also* ¶¶ 33-34. Accordingly, the validity of the exemptions, without which there would be a

---

[20] *See Affidavit, supra* note 3 at A915-916 and accompanying text.

devastating effect on the water allocation underlying the City's water supply, is uncertain.

Additionally, NYSDEC has indicated its expectation that the exemptions will be revisited: the permit provides for a review of the exemptions upon completion of the activities required under a Schedule of Compliance required under the permit. *See SPDES Permit* at 6, footnote 7. Given the likelihood that the turbidity in diversions through the Shandaken Tunnel will not be significantly reduced through the activities required under the Schedule of Compliance, the City does not anticipate that its reliance on these exemptions in order to meet the demand of the nine million water consumers it serves will decrease over time. Thus, although the exemptions may temporarily help mitigate the conflict inherent in applying the NPDES permit program to systems of water allocation, they by no means reflect a satisfactory, permanent solution. And in any event, the City should not pay millions of dollars in Clean Water Act penalties for a transfer of drinking water that it was allocated more than eighty years ago.

D. The Second Circuit Should Not Have Ignored EPA's Pending Rulemaking Addressing Water Transfers

EPA's Notice of Proposed Rulemaking, issued less than a week before the Second Circuit made its decision in *Catskill Mountains Chapter of Trout Unlimited, Inc.*, indicates EPA's intention to adopt the Water Transfer Rule. This rule will confirm that water transfers are not subject to the NPDES permitting program. It will thus answer precisely the question that was before the Second Circuit – whether the City needs a NPDES permit to transfer untreated water through the Shandaken Tunnel.

Once the Water Transfer Rule is adopted,[21] the decision of the Second Circuit will directly conflict with an interpretation of the Clean Water Act entitled to *Chevron* deference. *Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837 (1984); *United States v. Mead Corp.*, 533 U.S. 218, 227 (2001).[22] Indeed, this conflict may arise even before the Rule is adopted, particularly in areas where EPA (rather than delegated state agencies) administers the Act.[23] In its August 5, 2005 Agency Interpretation, EPA instructed its staff that NPDES permits should not be issued for water transfers. App. A205. In the District of Columbia and five states, EPA administers the NPDES program directly, and thus in D.C., non-delegation states, and certain tribal lands, EPA will not issue NPDES permits for water transfers.

There is no question that Congress delegated authority to EPA to make rules implementing the Clean Water Act: "the Administrator [of EPA] is authorized to prescribe such regulations as are necessary to carry out his functions under" the Act. 33 U.S.C. § 1361(a). Instead of deferring to EPA, however, the Second Circuit in *Catskill Mountains Chapter of Trout Unlimited, Inc.* essentially pre-

---

[21] EPA has noted its intention to adopt the rule in the spring of 2007. United States' Notice Concerning Action by the Environmental Protection Agency, *Friends of the Everglades v. S. Fla. Water Mgmt. Dist.*, No. 02-CV-80309 (S.D. Fla. Nov. 15, 2006).

[22] The regulation must then be upheld by courts unless it is found to be "arbitrary, capricious, or manifestly contrary to the statute." *Chevron*, 467 U.S. at 844.

[23] Congress granted the EPA the authority to administer the NPDES program. In turn, the EPA may grant states the authority to run their own NPDES programs. Although state legislatures may choose to have more stringent regulatory programs than the federal NPDES program, more stringent requirements cannot be developed and imposed on the states by the circuit courts. 33 U.S.C. § 1370(1).

empted EPA's regulatory role. *City of New York*, 451 F.3d at 84-85.

The Second Circuit concluded that this Court's remand for a determination of whether the water bodies there at issue were meaningfully distinct signaled a holding which this Court explicitly did not reach: that there is a "legally significant distinction between inter- and intra-basin transfers." *City of New York*, 451 F.3d at 83. On the contrary, while this Court made clear that intra-basin transfers are not subject to the NPDES program, *Miccosukee*, 541 U.S. 95, 112, this Court "decline[d] to resolve" the issue of inter-basin transfers (and thus whether or not there is a legally significant distinction between inter- and intra-basin transfers), *Id.* at 109, noting that "the Government's 'unitary waters' argument is open to the [South Florida Water Management] District on remand." *Id.* at 112.[24]

For these reasons, the conclusion of the Second Circuit that the transfer of water through the Shandaken Tunnel is subject to the NPDES permit program is based on a misreading of the Clean Water Act. The Second Circuit improperly examined a single term, "addition," in isolation, while ignoring the rest the statute. In failing to read the term "addition" in context, the Second Circuit ignored Congress' clear mandate that diversions of water such as the Shandaken Tunnel are to be addressed as nonpoint sources of pollution, and are not subject to NPDES permitting. Moreover, the decision creates a direct conflict with Congress' instruction that the NPDES permit program shall not supersede, abrogate or impair either the authority

---

[24] EPA currently relies on an integrated reading of the Clean Water Act as a whole, including its legislative history, in reaching the result that the United States, as *amicus* in *Miccosukee*, characterized as the unitary waters approach. App. A182-88.

of states to allocate quantities of water, or the rights to quantities of water which have been established by any state. Finally, the decision improperly ignored EPA's interpretation of the statute.

Because of the serious harm that may result from the improper application of the NDPES program to people who rely on water transfers to bring water where needed for public health and safety, agriculture, and aquatic ecosystems, or to redirect water to prevent flooding, review of the decision by this Court is essential the proper application of the Clean Water Act NPDES program.

CONCLUSION

The petition for a writ of certiorari should be granted or, in the alternative, held for EPA's adoption of the Water Transfer Rule.

Respectfully submitted,

MICHAEL A. CARDOZO
Corporation Counsel of the
City of New York
100 Church Street
New York, New York 10007
(212) 788-1585

LEONARD J. KOERNER,*
HILARY MELTZER,
WILLIAM S. PLACHE,
BRIDGET EICHINGER,**
of Counsel.

*Counsel of Record
**Awaiting Admission

Supreme Court, U.S.
FILED
NOV 20 2006
OFFICE OF THE CLERK

No. 06-729

IN THE
SUPREME COURT OF THE UNITED STATES

CITY OF NEW YORK, NEW YORK CITY DEPARTMENT OF ENVIRONMENTAL PROTECTION, and JOEL A. MIELE, SR., Commissioner of Department of Environmental Protection.
Petitioners,

-v.-

CATSKILL MOUNTAINS CHAPTER OF TROUT UNLIMITED, LTD., THEODORE GORDON FLYFISHERS, INC., CATSKILL-DELAWARE NATURAL WATER ALLIANCE, INC., FEDERATED SPORTSMEN'S CLUBS OF ULSTER COUNTY, INC., RIVERKEEPER, INC., STATE OF NEW YORK, NEW YORK STATE DEPARTMENT OF ENVIRONMENTAL CONSERVATION, and ERIN M. CROTTY, Commissioner of the New York State Department of Environmental Conservation,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

APPENDIX TO PETITION FOR A WRIT OF CERTIORARI

LEONARD J. KOERNER,*
HILARY MELTZER,
WILLIAM S. PLACHE,
BRIDGET EICHINGER,**
of Counsel.
*Counsel of Record
**Awaiting Admission
November 20, 2006

MICHAEL A. CARDOZO,
Corporation Counsel of the
City of New York
100 Church Street
New York, NY 10007
(212) 788-1585

APPENDIX TO PETITION
FOR WRIT OF CERTIORARI
TABLE OF CONTENTS

Page

Decision of the United States
Court of Appeals for the Second
Circuit, Dated June 13, 2006
(Reported at 451 F.3d 77) A1

Memorandum-Decision and Order of the United States
District Court for the Northern District
Of New York, Dated October 4, 2000 ..... A24

Decision and Order of the United States
District Court for the Northern District
of New York, Dated January 19, 2001 ..... A41

Decision of the United States
Court of Appeals for the Second
Circuit, Dated October 3, 2001
(Reported at 273 F.3d 481) A52

Order of the United States
District Court for the Northern District
of New York, Dated June 4, 2002 ..... A78

Memorandum-Decision and Order of the United States
District Court for the Northern District
of New York, Dated
February 6, 2003 (Reported at 244 F. Supp. 2d 41) A85

Order and Amended Judgment of the United States
District Court for the Northern District
of New York, Dated October 23, 2006 ..... A129

Order of the United States
Court of Appeals for the Second
Circuit, On Petition for Rehearing and Rehearing
En Banc Filed, August 25, 2006 ..... A139

Relevant Provisions of Federal Water
Pollution Control Act A143

United States Environmental Protection Agency,
Notice of Proposed Rulemaking, *National Pollutant*
Discharge Elimination System (NPDES)
Water Transfers Proposed Rule,
71 Fed. Reg. 32, 887, (proposed June 7, 2006)
(to be codified at 40 C.F.R. pt. 122)
("Notice of Proposed Rulemaking") A170

Ann Klee & Benjamin Grumbles, United States
Environmental Protection Agency,
Agency Interpretation on Applicability of
Section 402 of the Clean Water Act to Water Transfers
(Aug. 5, 2005) ("EPA Interpretation") A205

DECISION OF THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT, DATED JUNE 13, 2006

(Reported at 451 F.3d 77)

REPRODUCED FOLLOWING

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT
August Term 2005

(Submitted: November 21, 2005

Decided: June 13, 2006)

Docket Nos. 03-7203 (L); 03-7253 (XAP)

CATSKILL MOUNTAINS CHAPTER OF TROUT UNLIMITED, INC., THEODORE GORDON FLYFISHERS, INC., CATSKILL-DELAWARE NATURAL WATER ALLIANCE, INC., FEDER-ATED SPROTSMEN'S CLUBS OF USLTER COUNTY, INC. and RIVERKEEPER, INC.,

Plaintiffs-Appellees-Cross-Appellants,

- v. -

CITY OF NEW YORK and NEW YORK CITY DEPARTMENT OF ENVIRONMENTAL PROTECTION,

Defendants-Third-Party-Plaintiffs-Appellants-Cross-Appellees,

JOEL A. MIELE, SR., COMMISSIONER of the Department of Environmental Protection,

Defendant-Appellant-Cross-Appellee,

- v. -

STATE OF NEW YORK, NEW YORK STATE DEPARTMENT OF ENVIRONMENTAL CONSERVA-TION, and ERIN M. CROTTY, Commissioner of the

New York State Department of Environmental Conservation,

Third-Party-Defendants-Appellees.

Before:

WALKER, Chief Judge,
OAKES and JACOBS, Circuit Judges.

Appeal from a decision of the United States District Court for the Northern District of New York (Frederick J. Scullin, Jr., *Chief Judge*) holding the City of New York liable for violations of the Clean Water Act, imposing civil penalties, and awarding injunctive relief to Plaintiffs-Appellees-Cross-Appellants.

AFFIRMED in part and REMANDED in part.

KARL S. COPLAN, Pace Environmental Litigation Clinic, Inc. (Kara E. Murphy, Legal Intern, on the brief), White Plains, New York, for Plaintiffs-Appellees-Cross-Appellants.

HILARY MELTZER, Assistant Corporation Counsel (Michael A. Cardozo, Corporation Counsel of the City of New York, William S. Plache, *on the* brief), New York, New York, for *Defendants -Third- Party-Plaintiffs-Appellants-Cross-Appellees.*

JAMES M. TIERNEY, Assistant Attorney General (Eliot Spitzer, Attorney General of the State of New York, Michelle Aronowitz, Deputy Solicitor General, Peter H. Lehner,

Chief, Environmental Protection Bureau, Gordon J. Johnson, Deputy Bureau Chief, Robert H. Easton, Assistant Solicitor General, *on the brief*), Albany, New York, for *Third-Party-Defendants-Appellees.*

JOHN M. WALKER, JR., Chief Judge:

The City of New York ("the City") operates the Shandaken Tunnel ("Shandaken Tunnel" or "the Tunnel") as part of its water-management system that delivers drinking water to New York City and the immediate surrounding area. Water from the Tunnel, which is high in turbidity, discharges into the Esopus Creek ("Esopus Creek" or "the Creek"), a trout stream used for flyfishing and other recreational activities. The Catskill Mountains Chapter of Trout Unlimited, Inc., Theodore Gordon Flyfishers, Inc., Catskill-Delaware Natural Water Alliance, Inc., Federated Sportsmen's Clubs of Ulster County, Inc., and Riverkeeper, Inc. (collectively "Catskills") brought a citizen suit against the City, alleging that the City's use of the Tunnel without a permit violated the Clean Water Act ("CWA" or "Act"), 33 U.S.C. §§ 1251 et seq. In an October 21, 2001, opinion, we held that the CWA permit requirements apply to the Shandaken Tunnel discharges and remanded to the district court. On remand, the district court assessed a $5,749,000 civil penalty against the City and ordered the City to obtain a permit for the operation of the Tunnel. This appeal followed.

BACKGROUND

I. Relevant Clean Water Act Provisions

The purpose of the CWA is "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters." 33 U.S.C. § 1251(a). As part of the program to achieve this goal, the Act states that "the discharge of any pollutant by any person shall be unlawful," *id.* § 1311(a), unless it is done in compliance with other provisions of the Act. One of those other provisions, the National Pollutant Discharge Elimination System ("NPDES"), *id.* § 1342(a), establishes a permit system. Under this provision, the Environmental Protection Agency ("EPA") or state administrators may issue a permit for the discharge of a pollutant at levels below the effluent limitations specified in the permit. *Id.* The CWA broadly defines "discharge of a pollutant" as "any addition of any pollutant to navigable waters from any point source." *Id.* § 1362(12).

Although the CWA establishes this federal permitting scheme, the Act also recognizes that states retain the primary role in planning the development and use of land and water resources, *id.* § 1251(b), allocating quantities of water within their jurisdictions, *id.* § 1251(g), and regulating water pollution, as long as those state regulations are not less stringent than the requirements set by the CWA, *id.* § 1370.

II. The Shandaken Tunnel and the Esopus Creek

As part of the water system that supplies New York City with its drinking water, the City maintains the Schoharie Reservoir in the Catskill Mountains. To deliver this water eventually to New York City, water from the Schoharie Reservoir is diverted through the eighteen-mile Shandaken Tunnel and discharged into the Esopus Creek.

The Creek's water, in turn, flows into the Ashokan Reservoir, through the Catskill Aqueduct, to a series of reservoirs and tunnels along the east side of the Hudson River, and eventually to New York City. Absent the man-made diversion through the Tunnel, water from the Schoharie Reservoir would never reach the Esopus Creek. *Catskill Mountains Ch. of Trout Unltd. v. City of New York*, 273 F.3d 481, 484 (2d Cir. 2001) (*"Catskills I"*).

Because water in the Schoharie Reservoir contains suspended solids from both natural and man-made causes, discharges from the Tunnel into the Creek are more turbid[1] than the waters of the Esopus. This turbidity impairs use of the Esopus for fly fishing and other recreational activities. Pursuant to state regulations, the City has been studying ways to reduce the turbidity in the water discharged from the Tunnel but so far has failed to find a way to do so. Until this lawsuit, neither the EPA nor the New York State Department of Environmental Conservation ("NYDEC"), the agency that enforces the CWA in New York State, had ever regulated the turbidity in the Tunnel under the CWA's permitting scheme.

III. Procedural History

In March 2000, Catskills, recreational users of the Esopus Creek, brought this citizen suit under the CWA alleging that the City's discharge of turbid water from the Tunnel violated 33 U.S.C. § 1311(a), which, as we said, prohibits "the discharge of any pollutant" without a discharge permit. The district court dismissed the claim on the pleadings, holding that the discharge from the Tunnel did not constitute an "addition" of a pollutant to the Creek under 33 U.S.C. § 1362(12).

---

[1] The parties do not contest that turbidity qualifies as a pollutant under the CWA.

In October 2001, we reversed after concluding that the discharge of water containing pollutants from one distinct water body into another is an "addition of [a] pollutant" under the CWA. *Catskills I*, 273 F.3d at 491-93. As a result, we determined that the discharge from the Tunnel into the Creek requires a permit.

On remand from *Catskills I*, the district court granted summary judgment to the plaintiffs and went on to deter-mine the civil penalties to be assessed against the City. The district court concluded that no penalties should be imposed for the City's actions prior to June 22, 2002, eight months after *Catskills I* put the City on notice that it needed a permit for the Shandaken discharges. Finding a delay of more than eight months unreasonable, however, the district court imposed the maximum penalty for the period from June 22, 2002, to December 31, 2002, when the City filed its permit application; the penalty totaled $5,749,000. This appeal followed.

DISCUSSION

In this appeal, the City asks us to reconsider our holding in *Catskills I* that the discharge of turbid water from the Shandaken Tunnel into the Esopus Creek requires a permit. The City also argues that the penalty of $5,749,000 is too high. In a cross-appeal, Catskills argues that amount is too low.

We are free to reconsider our holding in *Catskills I* if there are cogent, compelling reasons for doing do, such as a change in controlling law or newly discovered facts. *United States v. Tenzer*, 213 F.3d 34, 39 (2d Cir. 2000). Determining whether we should reconsider requires briefly revisiting our reasoning in *Catskills I*.

I. Catskills I

In concluding that the transfer of turbid water from the Shandaken Tunnel to the Esopus Creek qualified as the "discharge of [a] pollutant," 33 U.S.C. § 131 l (a), requiring an NPDES permit, *Catskills I* first noted the CWA's broad definition of the "discharge of a pollutant" as "any addition of any pollutant to navigable waters from any point source." *Id.* § 1362(12). Because the Shandaken Tunnel "plainly qualifies as a point source," *Catskills I*, 273 F.3d at 493, our holding rested, in principal part, on the meaning of "addition," which the CWA leaves undefined. We decided that "addition" means the introduction into navigable water from the "outside world,"[2] with the outside world being defined as "any place outside the particular water body to which pollutants are introduced." *Id.* at 491.

In reaching this result, we distinguished the "dams cases," on which the City relied. In *National Wildlife Federation v. Gorsuch*,[3] 693 F.2d 156 (D.C. Cir. 1982), and *National Wildlife Federation v. Consumers Power Co.*,[4] 862 F.2d 580 (6th Cir. 1988), two sister circuits held that water taken from a water source and then released back into

---

[2] This phrase comes from the definition of the word "addition" urged by the EPA on the court in *National Wildlife Federation v. Gorsuch*, 693 P.2d 156, 175 (D.C. Cir. 1982). In *Gorsuch*, the EPA argued that an "addition of a pollutant" takes place only if the point source introduces a pollutant into the water from the outside world. *Id.*

[3] *Gorsuch* involved water released from a dam that, due to its impoundment, had a low dissolved oxygen rate, variable water temperature, high concentrations of dissolved minerals and nutrients, increased sediment levels, and was supersaturated with air---attributes that can be harmful to downstream waters and the wildlife inhabiting them. *Id.* at 161-64.

[4] *Consumers Power* involved water pumped from Lake Michigan through the turbines of a hydroelectric power plant and then released back into the lake-a process that pureed fish and other aquatic life and then released their remains as "pollutants" back into the lake. 862 F.2d at 583.

that same source was not an "addition" to navigable waters under the CWA, despite the fact that the water so released contained "pollutants." 693 F.2d at 183; 862 F.2d at 587. This case differed from the dams cases, we believed, because the Tunnel discharges water into the Creek from a source that is a different, distinct body of water. *Catskills I*, 273 F.2d at 491-92. In *Catskills I*, we analogized the dams cases to a soup ladle scooping soup out of a pot and returning it to that pot, a type of water transfer known as an intrabasin transfer. The Tunnel's discharge, in contrast, was like scooping soup from one pot and depositing it in another pot, thereby adding soup to the second pot, an interbasin transfer. Interbasin transfers, we held in *Catskills I*, constitute "additions," rendering the City's reliance on the dams cases misplaced. *Id.* at 492.

We also rejected the City's "unitary water" theory of navigable waters, which posits that all of the navigable waters of the United States constitute a single water body, such that the transfer of water from any body of water that is part of the navigable waters to any other could never be an "addition." We pointed out that this theory would lead to the absurd result that the transfer of water from a heavily polluted, even toxic, water body to one that was pristine via a point source would not constitute an "addition" of pollutants and would not be subject to the CWA's NPDES permit requirement. *Id.* at 493. *Catskills I* rejected the "unitary water" theory as inconsistent with the ordinary meaning of the word "addition." *Id.*

Finally, we rejected the contention that the provisions of the CWA reserving power to the states could overcome the express permit requirement for water transfers that result in the addition of pollutants. We pointed out that "like many complex statutes ... the CWA balances a welter of consistent and inconsistent goals" but that "none of the statute's broad purposes sways us from what we find to be the plain meaning of its text." *Id.* at 494.

II. Intervening Legal Developments

Following *Catskills I*, there have been two relevant legal developments. The Supreme Court decided *South Florida Water Management District v. Miccosukee Tribe of Indians*, 541 U.S. 95 (2004), and the EPA issued an agency interpretation addressing the applicability of the CWA's NPDES permit requirement to water transfers such as the one at issue in this case.

Miccosukee was a citizen suit contending that an NPDES permit is necessary for the South Florida Water Management District to operate a pump that conveys water from a polluted canal to an undeveloped wetland. The pump serves both to prevent the basin surrounding the canal from flooding and to preserve the wetland area. *Id.* at 100-01. Consistent with the dams cases, *Miccosukee* held that if the canal and the wetlands are not meaningfully distinct water bodies-an unresolved factual question-no NPDES permit is required. *Id.* at 112; *cf. S.D. Warren Co. v. Me. Bd. of Envtl. Prot.*, 126 S. Ct. 1843, 1850 (2006) ("[I]f two identified volumes of water are simply two parts of the same water body, pumping water from one into the other cannot constitute an "addition" of pollutants." (quoting *Miccosukee*, 541 U.S. at 109)).

On August 5, 2005, the EPA issued an agency interpretation regarding whether the movement of pollutants by a water transfer from one navigable water to a separate one is the "addition" of a pollutant subjecting the activity to the NPDES permitting requirement. According to the EPA, several provisions of the CWA indicate Congress's intent that such transfers be regulated by the states, not by the federal NPDES program. The EPA interpretation argues that, rather than primarily focusing on the meaning of the word "addition," as we did in *Catskills I*, a "holistic" view of the statute that takes this intent into account is appropriate.

The City concedes that this EPA interpretation is not entitled to *Chevron* deference. *See Chevron U.S.A., Inc. v. Natural Res. Def.*, 467 U.S. 837 (1984). Instead, the deference described in *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944), and *United States v. Mead Corp.*, 533 U.S. 218 (2001), is applicable. We thus defer to the agency interpretation according to its "'power to persuade.'" *Mead*, 529 U.S. at 235 (quoting *Skidmore*, 323 U.S. at 140).

III. Reconsideration of Catskills I

We turn to the City's request that we reconsider our holding in *Catskills I*. Rather than offering "compelling and cogent" reasons for reconsideration, however, the City basically serves us warmed-up arguments that we rejected in *Catskills I*, with the additional contention that either the Supreme Court's *Miccosukee* decision, the EPA interpretation, or both compel a result different from the one we reached earlier. We disagree.

The City first argues that new evidence developed below and the Supreme Court's decision in *Miccosukee* invalidate the distinction between intrabasin and interbasin water transfers. The "new evidence" the City points to simply shows that the release of water from a dam into down-stream water is no less likely to add pollutants as would a transfer of water from a distinct water body. Having considered the dams cases in *Catskills I*, we were aware of the presence of pollutants in intrabasin transfers. *Gorsuch* includes an extensive discussion of the nature of water quality changes wrought by dammed water. 693 F.2d at 161-64. And in *Consumers Power*, the water at issue contained fish that were pulverized as they passed through the turbines of a hydroelectric power plant and then were reintroduced into Lake Michigan as biological waste. 862 F.2d at 582. Nonetheless, *Catskills I* concluded that, despite the presence of pollutants in both interbasin and intrabasin transfers, interbasin transfers are properly distinguished

because they "add" pollutants to the navigable waters. *See Catskills I*, 273 F.3d at 492. This has not changed.

Nor does the Supreme Court's decision in *Miccosukee* render inter- and intra-basin transfers indistinguishable. *Miccosukee* cited with approval our "soup ladle" analogy and the distinction between inter- and intra-basin transfers. 541 U.S. at 109-10. The Court remanded the case to the district court to determine whether the water bodies in question were "two pots of soup, not one." *Id.*; *cf. S.D. Warren Co.*, 126 S. Ct. at 1850 n.6. This remand would be unnecessary if there were no legally significant distinction between inter- and intra-basin transfers.

The City also reasserts the unitary-water theory of navigable waters. Our rejection of this theory in *Catskills I*, however, is supported by *Miccosukee*, not undermined by it. In that case, the Supreme Court pointed out that several provisions of the CWA seem to distinguish among water bodies that are part of the navigable waters of the United States, implying that, at least in the context of the CWA, the unitary-water theory has no place. 541 U.S. at 105-09. *Miccosukee* also noted that the EPA has never endorsed the theory in any administrative documents. *Id.* at 107. Indeed, the Supreme Court pointed out that "the agency once reached the opposite conclusion." *Id.* Thus, *Miccosukee* did no more than note the existence of the theory and raise possible arguments against it. This does not constitute a change of controlling law warranting reconsideration of this court's previous decision on the issue.

Finally, the City points to the "holistic" argument, reflected in the EPA's 2005 agency interpretation,[5] to assert

---

[5] As noted above, the EPA's agency interpretation is entitled to deference only insofar as it has the power to persuade. *See Skidmore*, 323 U.S. at 140. Because the EPA and the City assert the same

that the proper allocation of rights and responsibilities between the states and the federal government for water regulation necessitates a reconsideration of our holding in *Catskills I*. This proposition is supported by amicus curiae briefs filed by western states who fear that the *Catskills I* rule will upend state regulation of water rights.

The argument relies on sections 101(g) and 510 of the CWA, 33 U.S.C. §§ 1251(g), 1370, both of which expressly reserve the authority of states over the water within their jurisdiction, as well as section 304(f) of the CWA, 33 U.S.C. § 1314(f), which governs non-point-source pollution. Section 101(g) provides that "the authority of each State to allocate quantities of water within its jurisdiction shall not be superseded, abrogated or otherwise impaired." Section 510 states that "[e]xcept as expressly provided in this chapter, nothing in this chapter shall . . . be construed as impairing or in any manner affecting any right or jurisdiction of the States with respect to the waters . . . of such States." Because, according to the City, there are no feasible means of reducing the pollution in the Tunnel, a permit requirement would effectively amount to a ban on the transfer of water from the Tunnel to the Creek and thereby interfere with New York's statutory water allocation rights.

This argument, too, was raised by the City in *Catskills I*, albeit less elaborately, and, as with the interbasin/ intrabasin distinction and the unitary-waters theory, *Miccosukee* fails to alter the legal landscape to support the "holistic" theory. The power of the states to allocate *quantities* of water within their borders is not

---

contentions on this point, we address the City and the EPA's position as one. For reasons discussed below, we do not find the argument persuasive and therefore decline to defer to the EPA.

inconsistent with federal regulation of water *quality*. Section 510 provides for the preservation of the preexisting rights of states not in conflict with the other requirements of the CWA ("except as expressly proved in this chapter"). Indeed, the Supreme Court has held that "[s]ections 101(g) and 510(2) preserve the authority of each State to allocate water quantity as between users; they do not limit the scope of water pollution controls. . . ." *PUD No. 1 v. Wash. Dep't of Ecology*, 511 U.S. 700, 720 (1994). To be sure, *Miccosukee* acknowledged the possibility that "construing the NPDES program to cover such transfers would . . . raise the costs of water distribution prohibitively, and violate" section 101(g). *Miccosukee,* 541 U.S. at 108. But in the next sentence, the Court recognized that, despite their potential cost, such permits nevertheless might be necessary to protect water quality. *Id.*

Nor does *Miccosukee* support the EPA and the City's argument that the non-point-source provisions of the CWA indicate congressional intent to leave interbasin water transfers outside the NPDES permitting scheme. Section 304(f) of the CWA directs the EPA to study and make recommendations for the regulation of pollutants spread by non-point sources, such as "changes in the movement, flow, or circulation of any navigable waters or ground waters, including changes caused by the construction of . . . flow diversion facilities." 33 U.S.C. § 1314(f)(2)(F). From this language, the EPA and the City claim that Congress intended that changes in the circulation of navigable waters caused by the construction of "flow diversion facilities," such as the Tunnel, be exempt from the permit requirements that apply to point sources. As the Supreme Court pointed out in *Miccosukee*, however, "1314(f)(2)(F) does not explicitly exempt nonpoint pollution sources from the NPDES program if they *also* fall within the 'point source' definition." 541 U.S. at 106.

In the end, while the City contends that nothing in the text of the CWA supports a permit requirement for interbasin transfers of pollutants, these "holistic" arguments about the allocation of state and federal rights, said to be rooted in the structure of the statute, simply overlook its plain language. NPDES permits are required for "the discharge of any pollutant," 33 U.S.C. § 1311(a), which is defined as "any addition of any pollutant to navigable waters from any point source," *id.* § 1362(12). It is the meaning of the word "addition" upon which the outcome of *Catskills I* turned and which has not changed, despite the City's attempts to shift attention away from the text of the CWA to its context. In *Catskills I*, we pointed out that complex statutes often have seemingly inconsistent goals that must be balanced. 273 F.3d at 494. The CWA seeks to achieve water allocation goals as well as to restore and maintain the quality of the nation's waters. The City and the EPA would have us tip the balance toward the allocation goals. But in honoring the text, we adhere to the balance that Congress has struck and remains free to change.

The City's final argument for reconsideration is that other provisions of federal and state law are more appropriate means of regulating the water discharged from the Shandaken Tunnel. The City points to the Safe Drinking Water Act, which limits the levels of contaminants that are allowed in public drinking water; section 303(d) of the CWA, which regulates pollution levels resulting from pollution from both point and non-point sources; and various provisions of state law that regulate water quality. While these provisions no doubt contribute to the goals of pollution reduction and regulation, the City does not explain how their existence invalidates a separate, independent requirement imposed by the permitting scheme of the CWA.

The City's plea for reconsideration appears to rest upon the assumption that regulating the discharge from the Tunnel would effectively require that the flow be stopped altogether. This claim seems to us exaggerated. We think the flexibility built into the CWA and the NPDES permit scheme, a flexibility that the City has endorsed in a related proceeding,[6] will allow federal authority over quality regulation and state authority over quantity allocation to coexist without materially impairing either.

We conclude this section with a somewhat detailed and technical accounting of the flexibilities that exist. Effluent limitations contained in NPDES permits fall into two categories: technology-based effluent limits[7] ("TBELs") and water-quality-based effluent limits ("WQBELs").[8] Where, as here, no applicable national TBELs have been set, the permit-writer may set TBELs using best professional judgment. *See* 33 U.S.C. § 1342(a)(1)(B); 40 C.F.R. § 125.3. In doing so, NYDEC will consider the available technologies, costs in relation to effluent reduction benefits, engineering aspects of various control techniques, available best management practices, and nonwater-quality environmental impacts. *See* 40 C.F.R. § 125.3(c), (d). This process thus affords the permit-writer "considerable flexibility in establishing permit terms and

---

[6] The City has acknowledged the NPDES system's flexibility in hearings related to its permit application. *See In re Application of the New York Cite Department of Environmental Protection*, DEC Application No. 3-5150-00420/00001, 2005 N.Y. Env. Lexis 40, at *24, *26 (June 22, 2005) (Ruling on Issues and Party Status).

[7] Technology-based limits are based on the effluent levels that can be achieved through the use of various water treatment technologies. *See* 40 C.F.R. § 125.3.

[8] Water-quality-based limits are those limits needed to ensure the appropriate water quality of the receiving water body. That water quality is specified by the state in which the water body is located.

conditions." EPA, NPDES Permit Writers' Manual 69 (1996). Only if the TBELs established by the NYDEC prove insufficient to achieve the water quality standards set by the state for the Esopus Creek[9] will more stringent WQBELs be adopted. 33 U.S.C. § 1312(a); 40 C.F.R. § 122.44(d).

If the City is unable to comply with the effluent limitations adopted by the NYDEC, CWA provisions and implementing regulations still provide means of enabling the NYDEC to issue a valid permit to the City. The permit may include a schedule of compliance, allowing the permittee to achieve compliance over time. 33 U.S.C. § 1362(17); 40 C.F.R. § 122.47. Indeed, the current draft permit prepared by the NYDEC in this case includes a compliance schedule that requires the City to investigate both technological and structural solutions to the turbidity problem and to implement those solutions according to a specified schedule. See NYS Env. Notice Bulletin, Notice of Completed Application for Shandaken Tunnel Outlet 7-9 (August 4, 2004).

Second, the NYDEC may allow a variance to WQBELs if the permittee demonstrates that achieving the effluent limitation contained in the permit is not feasible. 40 C.F.R. § 131.13; N.Y. Comp. Codes R. & Regs. tit. 6, § 702.17(b).[10] A variance is temporary and must include

---

[9] With respect to turbidity for water bodies like the Esopus Creek, New York's water quality standards require that there be "[n]o increase that will cause a substantial visible contrast to natural conditions." N.Y. Comp. Codes R. & Regs. tit. 6. § 703.2.

[10] Under N.Y. Comp. Codes R. & Regs. tit. 6, ti 702.17, the City might be eligible for a variance on the basis that its compliance with the existing standard is precluded by "naturally occurring pollutant concentrations," id. § 702.17(b)(l); "human-caused . . . sources of pollution," id. § 702.17(b){3); "dams, diversions or other types of hydrologic modifications," id. § 702. 17(b)(4); or the fact that

conditions to assure that the permittee makes "reasonable progress . . . toward achieving the [original] effluent limitations." *Id.* § 702.17(e)(2). It may be renewed subject to the same requirements. *Id.* § 702.17(g). Because the City is investigating means of reducing the turbidity of the Tunnel's discharge pursuant to state requirements, a temporary variance might well provide the time necessary to implement any reasonable and feasible solutions to the turbidity problem.

The draft Shandaken Tunnel permit issued by the NYDEC on August 4, 2004, illustrates additional flexibilities. The draft permit varies turbidity level restrictions by season, accepting higher levels at times when the natural turbidity level of the Creek is higher; it also contains exemptions from the effluent limitations when necessary to avoid drought conditions, to remedy emergency threats, to avert threats to public health or safety, or to allow repairs to the Schoharie Reservoir. *See* NYS Env. Notice Bulletin, Notice of Completed Application for Shandaken Tunnel Outlet 3, 4 n.2 (August 4, 2004).

The draft permit shows that the NPDES permit scheme can ensure that the water discharged from the Shandaken Tunnel will continue to meet the City's needs without unnecessarily sacrificing progress toward water quality goals. We find the City's position, that federal regulation of interbasin water transfers will lead to the termination of those transfers in contravention of the rights explicitly reserved to the states, to be alarmist and unwarranted.

---

compliance would "result in substantial and widespread economic and social impact," id. § 702,17(11)(6).

At bottom, the City's arguments for reconsideration of our holding in Catskills I are simply embellishments of those made in that case. Neither these arguments nor any intervening developments lead us to conclude that our earlier holding was reached in error or should otherwise be modified. We note that every other court faced with this issue has reached the same conclusion. See N. Plains Res. Council v. Fidelity Exploration & Dev. Co.,[11] 325 F.3d 1155 (9th Cir. 2003); *Miccosukee Tribe of Indians v. S. Fla. Water Mgmt. Dist.*,[12] 280 F.3d 1364 (1 1th Cir. 2002); *Dubois v. U.S. Dep't ofAgric.*,[13] 102 F.3d 1273 (1st Cir. 1996). While we recognize the incremental administrative burden our interpretation entails, we have little doubt that it nevertheless permits the City to deliver drinking water to its citizens while furthering the CWA's goal to "restore and maintain the chemical, physical, and biological integrity of the Nation's waters." 33 U.S.C. § 1251(a).

IV. Civil Penalty

---

[11] Northern Plains held that the discharges of groundwater derived from the extraction of coal bed methane into a river requires an NPDES permit. The court reasoned that the alteration of the chemical integrity of the river resulting from those discharges constituted an addition of a pollutant because such groundwater would not have flowed into the river but for the company's methane extraction processes. 325 F.3d at 1163.

[12] Before the Supreme Court granted certiorari in *Miccosukee*, the Eleventh Circuit held that the transfer of water that was high in phosphorus from a canal to a wetlands area required an NPDES permit. 280 F.3d at 1366, 1368-69.

[13] Dubois held that, when a ski area pumped water from a polluted river and discharged it into a pristine pond into which it otherwise would not

(continued...)

have flowed as part of a snow-making process, an NPDES permit was required for the discharge. 102 F.3d at 1296-99.

Both sides attack the $5,749,000 civil penalty imposed on the City by the district court. District courts have broad discretion in calculating civil penalties under the CWA. *See Tull v. United States*, 481 U.S. 412, 427 (1987) (noting that "highly discretionary calculations that take into account multiple factors are necessary in order to set civil penalties under the Clean Water Act"); *United States v. Smithfield Foods, Inc.*, 191 F.3d 5 16, 526 (4th Cir. 1999); *Hawaii's Thousand Friends v. Honolulu*, 821 F. Supp. 1368, 1395 (D. Haw. 1993). A district court's findings of fact in support of a CWA penalty are reviewed for clear error, *e.g., Smithfield Foods, Inc.*, 191 F.3d at 526; *Sierra Club, Lone Star Ch. v. Cedar Point Oil Co.*, 73 F.3d 546, 573 (5th Cir. 1996); *Pub. Interest Research Group of N.J., Inc. v. Powell Duffryn Terminals, Inc.*, 913 F.2d 64, 79 (3d Cit.. 1990), and the district court's determination of the penalty based on those facts is reviewed for abuse of discretion, *e.g., Smithfield Foods,* 191 F.3d at 526; Sierra Club, 73 F.3d at 573. In calculating civil penalties under the CWA, the court may begin either with the violator's estimated economic benefit from noncompliance (known as the "bottom-up" method) or with the statutory maximum allowable penalty (known as the "top-down" method). E. g., Smithfield Foods, 191 F.3d at 528 & n.7; United States v. Man. Auth. of Union Twp., 150 F.3d 259, 265 (3d Cir. 1998). This starting figure then may be adjusted after considering the six factors enumerated in section 309(d) of the CWA: (1) the seriousness of the violations; (2) the economic benefit resulting from the violation; (3) any history of violations; (4) good-faith efforts to comply with applicable requirements; (5) the economic impact of the penalty on the violator; and (6) other matters as justice may require. 33 U.S.C. § 1319(d). E.g., Sierra Club, 73 F.3d at 528, n.7. The court below opted to use the "top-down" method. Although neither party objected to this general approach, both sides take issue with the details of its implementation.

The district court began with the maximum statutory penalty and reduced that number due to factors mitigating in the City's favor. First, the district court found that the seriousness factor mitigated in favor of the City. Second, because the City's belief that it did not need a permit to operate the Tunnel was reasonable until the October 2001 decision of this court, the district court determined that the City should not be penalized for its history of violations. Third, the district court credited the City's ongoing efforts to reduce the turbidity of the water in the Tunnel pursuant to non-CWA regulation and its eventual application for a NPDES permit as indicating a good-faith effort to comply with applicable requirements. Finally, the district court considered the City's reasonable belief that a CWA permit was not necessary to be a mitigating factor.

Catskills faults the district court for its determination that the seriousness factor mitigated in favor of the City. This determination was based on three considerations: the pollution at issue resulted from natural conditions that caused turbidity and not toxic pollutants; there was no evidence that downstream fish were adversely affected by the discharge; and finally, the discharge, while turbid, actually improved the habitat for trout by raising low water levels. Because these findings have evidentiary support, we will not disturb them or the district court's conclusion that, taken together, they were a mitigating factor.

Both parties take issue with the district court's June 22, 2002, starting date for penalties, after which the court imposed the maximum penalty. Catskills argues that the starting date should have been October 21, 2001, the date of Catskills I, while the City contends that December 2002 would have been reasonable and that, in any event, the mitigating factors should have reduced the penalty imposed after the starting date. The district court did impose the

maximum daily penalty, but for only about nine per cent of the period for which the district court could have penalized the City.[14] The district court's choice of starting date accounted both for a reasonable time for the City to come into compliance with the CWA and for the mitigating factors; it will be sustained.

Both parties also attack the penalty figure based on the "economic benefit resulting from the violations" factor. The City argues that it is receiving no economic benefit from operating the Tunnel without a permit, so this factor should be treated as a mitigating factor. Catskills, on the other hand, argues that the City reaped a benefit by not having to build a filtration plant to screen the turbidity from the Tunnel's water, which Catskills says would cost $27 million. Even assuming the feasibility of such a plant, as to which the district court was skeptical, the district court found that construction of the plant would not have begun until 1995 at the earliest. Therefore, only costs that would have been incurred after that date, a figure consider-ably below $27 million, would be appropriately considered. In addition, there is a substantial question as to whether the City should be faulted for not building a plant during a period (prior to Catskills f) in which it did not believe it was in violation of the CWA. Considering the evidence on both sides of this issue, the district court did not abuse its discretion in determining that the issue of cost savings to the City from not building a plant should be deemed neither a mitigating factor nor a cause for in-creased penalties.

Finally, Catskills challenges the City's good faith belief that it did not need a permit to operate the Tunnel.

---

[14] Catskills filed its complaint on March 31, 2000. Because the CWA has a five--year statute of limitations, 28 U.S.C. ti 2462, that is tolled sixty days before the filing of a complaint, Sierra Club v. Chevron U.S.A.. Inc., 834 F.2d 1517, 1524 (9th Cir. 1987), January 30, 1995, is the date on which the City became liable for penalties.

The district court's determination that the City had such a good faith belief, based on credibility assessments, is deserving of deference and nothing in the record leads us to question it. Neither the EPA nor the NYDEC had ever indicated the necessity of a permit. The district court's decision not to penalize the City for a reasonable, albeit incorrect, interpretation of a statute is not an abuse of discretion.

In arriving at the penalty imposed below, the district court carefully considered the six factors laid out in section 309(d) of the CWA, relied on facts not clearly erroneous, and did not abuse its discretion in deciding the penalty. We have, however, uncovered a calculation error. The district court stated that the maximum statutory penalty for the final 131 days of 2002 was $31,500 per day. In fact, the maximum daily penalty remained $27,500 until March of 2004. 40 C.F.R. § 19.4. Thus, the maximum possible penalty was $62,725,000, not $63,249,000 as stated by the district court. Had the district court been aware that its initial calculation of the statutory maximum was $524,000 too high, it might have reduced the penalty by that amount. Or, even being aware of the true statutory maximum, it might have imposed the same penalty. Or it might have arrived at a penalty somewhere in between. Because we have no way to determine how the district court's calculation of the penalty would have differed, if at all, had it accurately determined the maximum statutory penalty, we remand the case for recalculation of the penalty in light of the true statutory maximum.

CONCLUSION

For the foregoing reasons, we affirm the district court's judgment except as to the amount of the civil penalty imposed on the City of New York and remand the case to the district court to recalculate that penalty.

MEMORANDUM-DECISION AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF THE NEW YORK, DATED OCTOBER 4, 2000

REPRODUCED FOLLOWING

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

---------- x

CATSKILL MOUNTAINS CHAPTER OF TROUT UNLIMITED, INC., THEODORE GORDON FLYFISHERS, INC., CATSKILLDELAWARE NATURAL WATER ALLIANCE, INC., FEDERATED SPORTSMEN'S CLUBS OF ULSTER COUNTY, INC., and RIVERKEEPER, INC.,

Plaintiff(s),

-against-

1:00-CV-511 (FJS/RFT)

THE CITY OF NEW YORK, NEW YORK CITY DEPARTMENT OF ENVIRONMENTAL PROTECTION, and JOEL A. MIELE, SR., COMMISSIONER OF DEPARTMENT OF ENVIRONMENTAL PROTECTION,

Defendant(s).

---------- x

APPEARANCES	OF COUNSEL
PACE ENVIRONMENTAL LITIGATION CLINIC, INC. 78 North Broadway White Plains, New York 10603 Attorneys for Plaintiffs	**KARL S. COPLAN, ESQ.**[1]
CITY OF NEW YORK OFFICE OF CORPORATION COUNSEL 100 Church Street New York, New York 10007-2601 Attorneys for Defendants	**SUSAN C. MOON, ESQ.**

SCULLIN, Chief Judge

U.S. DISTRICT COURT – N.D. OF N.Y. FILED OCTOBER 6, 2000, LAWRENCE K. BAERMAN, CLERK-SYRACUSE

---

[1] With the Court's permission, Basil Saggos, a law student, argued on Plaintiffs' behalf.

MEMORANDUM-DECISION AND ORDER

I. INTRODUCTION

Presently before the Court are Defendants' motions (1) to dismiss Plaintiffs' turbidity and thermal discharge claims, pursuant to Rule 12(b)(1) of the Federal Rules of Civil Procedure, for lack of subject matter jurisdiction; (2) to dismiss Plaintiff's suspended solids claim, pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure, for failure to state a claim *upon* which relief can be granted; and (3) for a more definite statement pursuant to Rule 12(e) of the Federal Rules of Civil Procedure. On September 22, 2000, the Court heard oral argument on these motions and reserved decision. The following constitutes the Court's analysis and conclusions with respect to these motions.

II. BACKGROUND

On November 20, 1998, Plaintiffs mailed notice of alleged violations of the Clean Water Act ("CWA") and of Plaintiffs' intent to file suit to the Administrator of the United States Environmental Protection Agency, the New York State Department of Environmental Conservation, and to Defendants as required by Section 505(b)(1)(A) of the CWA, 33 U.S.C. § 1365(b)(1)(A). Fourteen months later, Plaintiffs filed the instant complaint. Plaintiffs brought this citizen suit seeking declaratory and injunctive relief under Section 301 of the CWA, 33 U.S.C. § 1311(a), against Defendants for allegedly violating the CWA by their unpermitted and unlawful discharge of pollutants from the Shandaken Tunnel into Esopus Creek.

Defendants operate the Shandaken Tunnel as part of the New York City Catskill Water Supply System. See Complaint at ¶ 20. The Shandaken Tunnel begins at the Schoharie Reservoir in Delaware County, passes through Green County, and into Ulster County where it discharges

into Esopus Creek. See id. at ¶ 19. When the Shandaken Tunnel is in operation, the intake pipe accepts water from the Schoharie Reservoir and adds it into the Shandaken Tunnel. The water flows through the Shandaken Tunnel and is discharged into Esopus Creek. See id. at ¶ 21. In the absence of the Shandaken Tunnel, water from the Schoharie Reservoir would not reach Esopus Creek because Esopus Creek is located in a different watershed than the Schoharie Reservoir. See id. at ¶¶ 22, 37.

The water in Esopus Creek is naturally more clear, or less turbid and lower in suspended solids, than the water of the Schoharie basin. See id. at ¶ 23. The New York State Department of Environmental Conservation ("DEC") has designated Esopus Creek, between the outlet of the Shandaken Tunnel and the inlet of the Ashokan Reservoir, as a Class A(T) stream. This classification signifies high quality water that is suitable for a trout fishery. See id. at ¶ 22. The discharge from the Shandaken Tunnel into Esopus Creek contains a high level of turbidity and suspended solids in the form of fine red clay particles. See id. at ¶¶ 27-28. The discharge from the Shandaken Tunnel periodically contains elevated temperatures that stress trout populations in Esopus Creek. See id. at ¶ 30.

The City of New York has neither applied for, nor been granted, a National Pollutant Discharge Elimination System ("NPDES") or a State Pollutant Discharge Elimination System ("SPDES") permit for its discharges into Esopus Creek. See id. at ¶ 35. Plaintiffs assert . that Defendants have violated and will continue to violate "an effluent standard or limitation" under § 505(a)(l)(A) of the CWA, 33 U.S.C. § 1365(a)(1)(A), because of their illegal and unpermitted discharge from the Shandaken Tunnel into Esopus Creek. See id. at ¶ 38.

III. DISCUSSION

A. Subject Matter Jurisdiction

The CWA authorizes a citizen to bring a suit in federal court against any person who is alleged to be in violation of "an effluent standard or limitation" as defined by the CWA. To commence a suit, however, a citizen must comply with § 1365(b), which provides, in pertinent part,

> No action may be commenced -
>
> (1) under subsection (a)(1) of this section - (A) prior to sixty days after the plaintiff has given notice of the alleged violation (i) to the Administrator [of the EPA], (ii) to the State in which the alleged violation occurs, and (iii) to any alleged violator of the standard, limitation, or order, . . .

33 U.S.C. § 1365(b).

The purpose of this notice requirement "'is to give [the alleged violator] an opportunity to bring itself into compliance with the Act and thus likewise render unnecessary a citizen suit.'" Atlantic States Legal Found., Inc. v. Stroh Die Casting Co., 116 *F.3d* 814, 818 (7th Cir. 1997) (quoting [Gwaltney,] 484 U.S. at 60, 108 S. Ct at 383) (other citation omitted).

In the present case, Defendants do not dispute that Plaintiffs sent them a notice letter. Rather, they claim that Plaintiffs' notice letter lacks the specificity required by the CWA and its regulations to put Defendants on notice of the violations upon which Plaintiffs intended to sue. Specifically, Defendants contend that Plaintiffs' letter failed to identify the specific standard, limitation or order alleged to have been violated and failed to list two of the

pollutants -- turbidity and thermal discharge - which, together with suspended solids, form the basis of Plaintiffs' complaint. Due to this alleged lack of specificity, Defendants argue that the notice is legally insufficient and, therefore, the Court lacks subject matter jurisdiction over Plaintiff's turbidity and thermal discharge claims.

Defendants rely upon Hallstrom v. Tillamook County, 493 U.S. 20 (1989), to support their position that this Court lacks subject matter jurisdiction over Plaintiffs' turbidity and thermal discharge claims because Plaintiffs' notice letter lacks the necessary specificity.[2] The issue before the Court in Hallstrom was whether compliance with the Resource Conservation and Recovery Act's ("RCRA") 60-day notice provision (modeled on the CWA's notice provision) was "a mandatory precondition to suit or [could] be disregarded by the district court at its discretion." Id. at 23. The Court concluded that "[u]nder a literal reading of the statute, compliance with the 60-day notice provision is a mandatory, not optional, condition precedent for suit." Id. at 26. Unlike the situation here, however, the plaintiff in Hallstrom sent no notice letter prior to commencing suit. Therefore, the Court in Hallstrom had no occasion to address the sufficiency of the contents of a RCRA notice. Accordingly, Hallstrom is not dispositive of the issue before this Court.

What are dispositive, however, are the EPA's regulations which set forth the notice requirements:

---

[2] There is no question that had Plaintiffs not complied with the CWA's 60-day notice requirement, the Court would have to dismiss the complaint (even if Defendants had learned about the claims in another way). Plaintiffs, however, did provide Defendants with notice. Thus, the question is whether the Court must dismiss the turbidity and thermal discharge claims because. these claims were not explicitly mentioned in Plaintiffs' notice letter.

> Notice regarding an alleged violation of an effluent standard or limitation or of an order with respect thereto, shall include sufficient information to permit the recipient to identify the specific standard, limitation, or order alleged to have been violated, the activity alleged to constitute a violation, the person or persons responsible for the alleged violation, the location of the alleged violation, the date or dates of such violation, and the full name, address, and telephone number of the person giving notice.

40 C.F.R. § 135.3(a).

Defendants argue that Plaintiffs' notice letter fails to meet those requirements because (1) it fails to provide notice of the "parameters" or "types" of violations which Plaintiffs assert in their complaint; (2) it mentions neither turbidity nor thermal discharge; and (3) it fails to disclose the activities which allegedly constitute these regulatory violations.

Plaintiffs' notice letter states, in pertinent part,

> [Plaintiffs] believe that the City of New York has violated and continues to violate "an effluent standard or limitation" under section 505(a)(1)(A), by discharging pollutants from a point source without a permit in violation of section 301(a) of the CWA, 33 U.S.C. § 1311(a).
>
> Based on data collected by the Catskill Delaware Natural Water Alliance, Inc., Complainants believe that the City of New York has discharged from the Shandaken

> aqueduct, and continues to discharge, pollutants in the form of Total Suspended Solids and Settleable Solids into the Esopus Creek, a class A stream, 6 NYCRR § 862.6. These violations have occurred and continue to occur every day that the Shandaken tunnel delivers water into the Esopus Creek, which has been every day that the tunnel operates for at least the past five years (the statute of limitations period under the Clean Water Act).

See Plaintiffs' Ntice Letter, attached as Exhibit "B" to the Affidavit of Susan Moon, dated May 25, 2000.[3]

Plaintiffs' notice letter clearly provides the notice required by 40 C.F.R. § 135.3(a), at least with respect to suspended and settleable solids. The only issue, therefore, is whether turbidity and thermal discharges -- which are not explicitly mentioned in the notice letter - are similar enough to suspended and settleable solids to have put Defendants on notice that these pollutants also formed the basis for Plaintiffs' complaint.

In support of their claim that turbidity and thermal discharge are inseparable from suspended solids, Plaintiffs direct the Court to the common meaning of these terms. In this regard, Plaintiffs assert that the term "suspended solids" is commonly equated with turbidity. See Plaintiffs' Memorandum of Law at 10 (citing *The American Heritage Dictionary of the English Language* (Copyright 1996, Houghton Mifflin Company) *("turbid* is defined as 'having sediment or foreign particles stirred up or suspended;

---

[3] Plaintiffs' notice letter also contains the full names, addresses, and telephone numbers of all Plaintiffs.

muddy,' while the word *turbidity has* the meaning 'muddiness created by stirring up sediment or having foreign particles suspended.'"). Moreover, Plaintiffs claim that the EPA, Office of Water, on its website, states that "higher turbidity increases water temperatures because suspended particles absorb more heat." See id. Based upon these definitions, Plaintiffs conclude that "suspended solids, turbidity and thermal discharges are inseparably linked in such a way that the notice of suspended solids was sufficient to place Defendants on notice thereby satisfying its purpose." Id. at 10-11. Based upon the relationship between suspended solids (which were referenced in the notice letter) and their effect on turbidity and water temperature, the Court finds that Plaintiffs' notice letter sufficiently notified Defendants of these claims and, therefore, complies with § 135.3(a). Accordingly, the Court denies Defendants' motion to dismiss Plaintiffs' turbidity and thermal discharge claims for lack of subject matter jurisdiction.

B. Defendants' Motion to Dismiss for Failure to State a Claim

To state a claim for the improper discharge of a pollutant without an NPDES permit pursuant to § 301 of the CWA, "five elements must be present: (1) a pollutant must be (2) added (3) to navigable waters (4) from (5) a point source." National Wildlife Fed'n v. Gorsuch, 693 F.2d 156, 165 (D.C. Cir. 1982). Defendants contend that Plaintiffs have failed to allege sufficient facts to state a claim that the discharge of suspended sediments into Esopus Creek is an illegal and unpermitted discharge within the meaning of the CWA. Specifically, Defendants contend that Plaintiffs' failure to state in their complaint that suspended sediments are a "pollutant" is fatal to their claim.

A careful reading of Plaintiffs' complaint, however, demonstrates that Plaintiffs have alleged

sufficient facts from which it can be inferred that suspended sediments are a pollutant. In this regard, Plaintiffs' complaint states that "Defendant's discharges of suspended solids, turbidity, and heat into the Esopus Creek are illegal and unpermitted discharges within the meaning of section 301(a) of the Clean Water Act, 33 U.S,C. § 1311(a)." See Complaint at 39. Since a discharge is illegal only if the discharged substance is a pollutant, it can reasonably be inferred from the complaint that Plaintiffs are alleging that suspended solids are a pollutant within the meaning of the CWA. Moreover, because in addressing a motion to dismiss the Court must draw all reasonable inferences in Plaintiffs' favor, the Court concludes that Plaintiffs have sufficiently alleged that suspended solids are a pollutant for purposes of their CWA claims.

More troubling, and ultimately dispositive of this motion, is Defendants' contention that Plaintiffs have failed to allege that the discharge of suspended solids, turbidity and heat into Esopus Creek is "an addition" of pollutants "from" a point source. According to Defendants, an "addition" occurs only if "the point source itself physically introduces a pollutant into water from the outside world." See Defendants' Reply Memorandum of Law at 2 (quoting Nat'l Wildlife Fed'n v. Gorsuch, 693 F.2d 156, 165, 174-75 (D.C. Cir. 1982)). Therefore, Defendants argue that Plaintiffs' allegation that Defendants' redirection of water, which already contains suspended solids, from one body of water to another constitutes a point source discharge is not sufficient to establish an "addition" for purposes of the CWA. See Defendants' Memorandum of Law at 14.

In response, Plaintiffs assert that Defendants are adding pollutants in the form of suspended solids, turbidity and heat from the Schoharie Reservoir through the Shandaken Tunnel into Esopus Creek. They claim that "[t]his type of 'addition' is precisely what the Clean Water Act is intended to prohibit, since it has turned a renowned

trout stream into a water body that is now unsuitable for trout fishing." See Plaintiffs' *Memorandum of Law at* 13-14. Therefore, Plaintiffs assert that "in order to continue the discharge of suspended solids, turbidity and elevated temperatures into the Esopus Creek within the limits of the law, [Defendants] must be required to apply for and be granted a NPDES/SPDES permit," as required by § 402 of the CWA, 33 U.S.C. § 1342. See id. at 14.[4]

The only case that arguably supports Plaintiffs' position is Dubois v. United States Dep't of Agric., 102 F.3d 1273 (1996). Plaintiffs rely upon Dubois for the proposition that Defendants' diversion of water is an "addition" because the Schoharie Reservoir and Esopus Creek are two separate bodies of water. In response, Defendants rely upon National Wildlife Fed'n v. Gorsuch, 693 F.2d 156 (D.C. Cir. 1982), and National Wildlife Fed'n v. Consumers Power Co., 862 F.2d 580 (6th Cir. 1988), to support their argument that the mere diversion of water without more does not constitute an "addition."

Although none of these cases are directly on point, they offer some insight into factors courts have considered to determine what constitutes an "addition" for purposes of the CWA. In Dubois, the Loon Mountain Recreation Corporation drew water from Loon Pond and the Pemigewasset River for its snowmaking operations. After it had used the water to pressurize and prevent freezing in its snowmaking equipment, it discharged the water into Loon Pond.

---

[4] Plaintiffs also contend that they have adequately alleged the "addition" of a pollutant because water from the Schoharie Reservoir would not reach Esopus Creek in the absence of the Shandaken Tunnel and the water of Esopus Creek is naturally more clear, or less turbid and lower in total suspended solids, than the water of the Schoharie basin. See Plaintiffs' Memorandum of Law at 18.

Based upon these facts, the First Circuit concluded that the diversion of the river water with its pollutants into Loon Pond (which was not connected to the river) was an addition which required a permit under the CWA. In reaching its decision, the First Circuit specifically distinguished Gorsuch, which it characterized as involving a dam that merely accumulated water and Consumers Power Co., which involved a pump storage facility that stored water from one source in a different place, from the situation in Dubois in which water was moved from one flowing water body into another stationary, cold body of water. See Dubois, 102 F.3d at 1299.

Unlike Dubois, the court in Gorsuch concluded that the mere diversion of water did not constitute an "addition" for purposes of the CWA. In that case, the plaintiff argued (similarly to Plaintiffs in this case) that any adverse change in the quality of reservoir water from its natural state involved a "pollutant" and that release of polluted water through a dam into a downstream river constituted the "addition" of a pollutant to navigable waters "from" a point source. To the contrary, the EPA argued that for an addition of a pollutant from a point source to occur, the point source must introduce the pollutant into navigable water from the outside world. See Gorsuch, 693 F.2d at 174-75. According to the EPA, dam-caused pollution, in contrast, merely passed through the dam from one body of navigable water (the reservoir) into another (the downstream river). In addition, although the EPA conceded that all adverse water quality changes are "pollution" - broadly defined in § 1362(19) as "'the man-made or man-induced alteration of the chemical, physical, biological, and radiological integrity of water -- [the] EPA argue[d] that low dissolved oxygen, cold, and supersaturation were not included in the narrower statutory term 'pollutant,' defined in § 502(6), 33 U.S.C. § 1362(6) as: 'dredged spoil, solid waste, incinerator residue, sewage, garbage, sewage sludge,

munitions, *chemical* wastes, biological materials, radioactive materials, heat, wrecked or discarded equipment, rock, sand, cellar dirt and industrial, municipal, and agricultural waste discharged into the water.' Id. at 165 (footnote omitted).

The court in Gorsuch recognized that the CWA did not define what constitutes an "addition of a pollutant." It also recognized that Congress had not expressly addressed whether the EPA should have discretion to define "addition." The court noted, however, that Congress had given the EPA the reasonable discretion to define "point source" and "pollutant" Therefore, the court concluded that it was "likely that Congress would have given EPA similar discretion to define `addition' had it expected the meaning of the term to be disputed." Id. at 175. Based upon its finding that the EPA's interpretation of "addition" was reasonable, the court concluded that because the EPA had concluded that the dam did not "add" pollutants into the downstream river, its interpretation was entitled to great deference and must be upheld. See id. at 166-68, 175.

The Sixth Circuit in Consumers Power Co. also found no "addition" of a pollutant based upon the facts before it. In that case, the district court had concluded that the defendant's hydro-electric facility's release of turbine generating water containing entrained fish into Lake Michigan required an NPDES permit The Sixth Circuit reversed, finding that the facility's movement of pollutants already in the water was not an "addition" of pollutants to navigable waters of the United States.

Relying upon Gorsuch, the Sixth Circuit concluded that "[t]o the extent that no more has been shown than that unclean water flows out of the dam, Congress clearly displayed an intention to exempt dams from the Clean Water Act." Consumers Power Co., 862 F.2d at 586. The court distinguished the case before it, in which a facility

merely transmitted water coming into it, from the situation in which the dam itself added pollutants to the water and, therefore, would be subject to the NPDES permits system. The court also noted that even if the facility had released heat into the water, the result would have been the same. See id. ("Indeed, it is fair to say that the release of water containing heat could be quite harmful to the fishery resources inhabiting a lake, yet the harmful character still would not make the water and its contents an `addition' of pollutants into navigable waters of the United States.").

In every case other than Dubois, where a court has found an "addition" of a pollutant, more has been involved than the simple diversion of water from one navigable body of water to another. See, e.g. Committee to Save Mokelumne River v. East Bay Mun. Utility Dist., 13 F.3d 305 (9th Cir. 1993) (court distinguished Gorsuch and Consumer Power Co. because the facility did not merely pass pollution from one body of navigable water to another. Rather, the source of pollution was "surface runoff that is collected or channeled by" the defendants from an abandoned mine site); United States v. Law, 979 F.2d 977 (4th Cir. 1992) (court distinguished Gorsuch and Consumer Power C., because the defendant's water treatment system collected runoff and leachate subject to an NPDES permit and the system was not part of the "waters of the United States"); Hudson River Fishermen's Ass'n v. City of New York, 751 F. Supp. 1088 (S.D.N.Y. 1990), aff'd without opinion, 940 F.2d 649 (2d Cir 1991) (court held that the City had violated the CWA by discharging chlorine and alum floc into the reservoir without first obtaining a pollution emissions permit).

In light of the EPA's interpretation of what constitutes an "addition" for purposes of the CWA (which the Dubois court did not consider) and the lack of any evidence that Defendants added anything to the water in the Reservoir before releasing it through the Shandaken tunnel,

the Court concludes that Plaintiffs have failed to establish a necessary element of their claim; i.e., that Defendants' diversion of water from the Schoharie Reservoir to Esopus Creek through the Shandaken tunnel constitutes an "addition" of pollutants "from" a point source. Accordingly, the Court grants Defendants' motion to dismiss Plaintiffs' complaint for failure to state a claim upon which relief can be granted.

C. Defendants' motion for a more definite statement

In light of the Court's decision to grant Defendants' motion to dismiss Plaintiffs' complaint pursuant to Rule 12(bX6) for failure to state a claim, the Court denies Defendants' motion for a more definite statement as moot.

IV. CONCLUSION

After carefully considering the file in this matter, the oral arguments and submissions of the parties and the applicable law, and for the reasons stated herein, it is hereby

ORDERED that Defendants' motion to dismiss Plaintiffs' complaint for lack of subject matter jurisdiction is **DENIED**; and it is further

ORDERED that Defendants' motion to dismiss Plaintiffs' turbidity and thermal discharge claims for failure to state a claim is **GRANTED**; and it is further

ORDERED that Defendants' motion for a more definite statement is **DENIED** as moot; and it is further

ORDERED that the Clerk of the Court enter judgment in favor of Defendants and against Plaintiffs and close this case.

IT IS SO ORDERED.

Dated: October 4 , 2000 Syracuse, New York

s/_____
Frederick J. Scullin, Jr.
Chief United States District Judge

DECISION AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF NEW YORK, DATED JANUARY 19, 2001

REPRODUCED FOLLOWING

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

---------- x

CATSKILL MOUNTAINS CHAPTER OF TROUT UNLIMITED, INC., THEODORE GORDON FLYFISHERS, INC., CATSKILL DELAWARE NATURAL WATER ALLIANCE, INC., FEDERATED SPORTSMEN'S CLUBS OF ULSTER COUNTY, INC., and RIVERKEEPER, INC.,

Plaintiff(s),

1:00-CV-511 (FJS/RFT)

-against-

THE CITY OF NEW YORK, NEW YORK CITY DEPARTMENT OF ENVIRONMENTAL PROTECTION, and JOEL A. MIELE, SR., COMMISSIONER OF DEPARTMENT OF ENVIRONMENTAL PROTECTION,

Defendant(s).

---------- x

APPEARANCES	OF COUNSEL
PACE ENVIRONMENTAL LITIGATION CLINIC, INC. 78 North Broadway White Plains, New York	**KARL S. COPLAN, ESQ.**

10603 Attorneys for Plaintiffs	
CITY OF NEW YORK OFFICE OF CORPORATION COUNSEL 100 Church Street New York, New York 10007-2601 Attorneys for Defendants	**SUSAN C. MOON, ESQ**
SCULLIN, Chief Judge	

ORDER

I. INTRODUCTION

After hearing oral argument on Defendants' motion on September 22, 2000, the Court issued a Memorandum-Decision and Order, dated October 6, 2000, in which the Court, among other things, granted Defendants' motion to dismiss Plaintiffs; complaint for failure to state a claim upon which relief could be granted.

Plaintiffs now move for reconsideration on the grounds that "the Court committed clear error on the level of deference appropriate to the EPA interpretation of the

words 'addition of a pollutant' for the purpose of the Clean Water Act, as controlling Supreme Court jurisprudence was overlooked." See Plaintiffs' Memorandum of Law at 3. Specifically, Plaintiffs argue that, in light of the Supreme Court's recent decision in Christensen v. Harris County, 120 S. Ct. 1655 (2000), the Court gave too much deference to the EPA's interpretation of what constitutes an "addition" for purpose of the Clean Water Act ("CWA").

II. DISCUSSION

A. Standard of Review

Generally, the courts in this district recognize only three possible bases *upon which* motions for reconsideration may be granted: "'(1) an intervening change in controlling law, (2) the availability of new evidence not previously available, or (3) the need to correct a clear error of law or prevent manifest injustice.'" Sumner v. McCall, 103 F. Supp. 2d 555, 558 (N.D.N.Y. 2000) (quoting In re C-TC 9th Ave. Partnership, 182 B.R. 1, 3 (N.D.N.Y. 1995) (McAvoy, C.J.)). Parties who base their

motion on the third ground have a demanding standard to meet. Under the "clear error" test, the court's previous decision will be disregarded only when the court has a "clear conviction of error" with respect to a point of law on which it based its previous decision. See Fogel v. Chestnutt, 668 F.2d 100, 109 (2d Cir. 1981). Thus, a party considering a motion for reconsideration should evaluate "'whether what may seem to be a clear error of law is in fact simply a point of disagreement between the Court and the litigant.'" Sumner, 103 F. Supp. 2d at 559 quoting In re C-TC 9th Ave, Partnership, 182 B.R. at 3).

As discussed below, Plaintiffs have not demonstrated that the Court committed a clear error of law in reaching its conclusion that Plaintiffs had failed to establish that Defendants' actions constituted an "addition" for purposes of the CWA. Therefore, the Court denies their motion for reconsideration.

B. "Clear Error" Standard

Plaintiffs claim that in light of the Supreme Court's

decision in Christensen, the Court committed clear error by affording too much deference to the EPA's interpretation of what constitutes an "addition" for purposes of the CWA. In Christensen, the Court held that agency interpretations such as those in opinion letters, policy statements, agency manuals, and enforcement guidelines, do not warrant the high level of deference afforded by Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837 (1984). Leg Christensen, 120 S. Ct. at 1662. Rather, the Court stated that "interpretations contained in formats such as opinion letters are 'entitled to respect,' . . ., but only to the extent that those interpretations have the 'power to persuade.'" Id. at 1663 (internal quotation and citation omitted)

Based upon this statement in Christensen, Plaintiffs argue that the EPA's interpretation of "addition" in National Wildlife Fed'n v. Gorsuch. 693 F.2d 156 (D.C. Cir. 1982), is entitled to little deference because that interpretation was never subjected to adjudication or notice

and comment rulemaking. See Plaintiffs' Memorandum of Law at 6. Moreover, Plaintiffs assert that since Gorsuch, is factually distinguishable from this case, the EPA's interpretation in Gorsuch should be given even less deference. See id. Defendants oppose Plaintiffs' motion for reconsideration on several grounds. First, Defendants argue that the Court's dismissal of Plaintiffs' complaint was based upon prior case law, not on undue deference to the EPA's interpretation of the Clean Water Act. See Defendants' Memorandum of Law at 5. Second, Defendants assert that the Court should not excuse Plaintiffs' failure to raise this argument in opposition to Defendants' motion to dismiss. See id. at 6-7. Finally, Defendants contend that there is no reasonable expectation that reconsideration of the Court's decision in light of Christensen would alter the conclusion the Court has already reached. See id. at 7-8.

Plaintiffs' argument, in essence, is premised upon their conclusion that the Court relied entirely upon the

EPA's interpretation of the term "addition" in determining that Defendants' diversion of water from the Schoharie Reservoir to Esopus Creek through the Shandaken tunnel did not constitute an "addition" of pollutants "from" a point source as required for a violation of the CWA. See Memorandum-Decision and Order at 13. Plaintiffs, however, place too much emphasis on part of one sentence in the Court's Memorandum-Decision and Order. See id. When this sentence is read in its entirety, it is clear that the Court did not rely entirely upon the EPA's interpretation of the term "addition" as a basis for its conclusion that Defendants' actions did not constitute an "addition." The sentence reads in full:

> In light of the EPA's interpretation of what constitutes an 'addition' for purposes of the CWA (which the Dubois court did not consider) and the lack of any evidence that Defendants added anything to the water in the Reservoir before releasing it through the Shandaken tunnel, the Court concludes that Plaintiffs have failed to establish a necessary element of their claim; i.e., that Defendants' diversion of water from the Schoharie Reservoir to Esopus Creek through the

> Shandaken tunnel constitutes an 'addition' of pollutants 'from' a point source.

See id.

Moreover, this statement appeared at the very end of the Court's decision and followed the Court's analysis of the decisions in Gorsuch and National Wildlife Fed'n v. Consumers Power Co., 862 F.2d 580 (6th Cit. 1988), which it found persuasive, and after it had distinguished Dubois v. United States Dep't of Agric., 102 F.3d 1273 (1996), the case upon which Plaintiffs relied to support their argument that Defendants' diversion of water constituted an "addition" for purposes of the CWA.

When the Court's reference to the EPA's interpretation of the term "addition" is read in the context of the Court's entire opinion, it is apparent that the Court gave no more deference to the EPA's interpretation of the term "addition" than it was entitled to under Christensen; i.e., the Court relied upon the EPA's interpretation only to the extent that it had the power to persuade. As set forth in its

discussion, the Court found the reasoning in Gorsuch and Consumers Power Co., to be persuasive in reaching its conclusion that Plaintiffs had failed to establish that Defendants' actions constituted an "addition" for purposes of the CWA and, thus, had failed to state a claim upon which relief could be granted.

Plaintiffs obviously disagree with the Court's decision and find Dubois more persuasive than Gorsuch and Consumers Power Co. However, this disagreement constitutes nothing more than a difference of opinion and does not rise to the level of a clear error of law which would warrant granting Plaintiffs' motion for reconsideration.

III. CONCLUSION

After carefully considering the file *in this* matter, the submissions of the parties and the relevant law, and for the reasons stated herein, it is hereby

ORDERED that Plaintiffs' motion for reconsideration is **DENIED**.

IT IS SO ORDERED.

Dated: January 19, 2001
Syracuse, New York

s/_____
Frederick J. Scullin, Jr.
Chief United State District Judge

DECISION OF THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT, DATED OCTOBER 3, 2001

(Reported at 273 F.3d 481)

REPRODUCED FOLLOWING

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse, Foley Square, in the City of New York, on the 23rd day of October, two thousand and one.

BEFORE: Hon. John M. Walker, Jr., Chief Judge

Hon. Robert A. Katzmann.
Hon. Richard D. Cudahy*
Circuit Judges.

Docket No. 00-9447

CATSKILL MOUNTAINS CHAPTER OF TROUT UNLIMITED, INC., THEODORE GORDON FLYFISHERS, INC., CATSKILL-DELAWARE NATURAL WATER ALLIANCE, INC., FEDERATED SPORTMEN'S CLUBS OF ULSTER COUNTY. INC. and RIVERKEEPER, INC.,

Plaintiffs-Appellants,

V.

THE CITY OF NEW YORK, NEW YORK CITY DEPARTMENT OF ENVIRONMENTAL PROTECTION and JOEL A. MIELE, SR., Commissioner of Department of Environmental Protection,

Defendants-Appellees.

---

* The Honorable Richard D. Cudahy of United States Court of Appeals for the Seventh Circuit, sitting by designation.

Appeal from the United States District Court for the Northern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Northern District of New York and was argued by counsel.

ON CONSIDERATION WHEREOF, it is hereby ORDERED, ADJUDGED and DECREED that the judgment of said district court be and it hereby is REVERSED in part, AFFIRMED in part and REMANDED for further proceedings in accordance with the opinion of this Court. Costs are awarded to appellants.

FOR THE COURT,
ROSEANN B. MACKECHNIE, Clerk
by s/_____
Arthur M. Heller,
Administrative Attorney

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

August Term 2000

(Argued May 25, 2001 Decided: October 23, 2001)

Docket Nos. 00-9447

CATSKILL MOUNTAINS CHAPTER OF TROUT UNLIMITED, INC., THEODORE GORDON FLYFISHERS, INC., CATSKILL-DELAWARE NATURAL WATER ALLIANCE, INC., FEDERATED SPORTSMEN'S CLUBS OF ULSTER COUNTY, INC. and RIVERKEEPER, INC.,

Plaintiffs-Appellants,

— v. —

CITY OF NEW YORK and NEW YORK CITY DEPARTMENT OF ENVIRONMENTAL PROTECTION and JOEL A. MIELE, SR., Commissioner of Department of Environmental Protection,

Defendants- Appellees,

Before:

WALKER, Chief Judge,
KATZMANN and CUDAHY, * Circuit Judges.

Plaintiff environmental organizations appeal from an October 6, 2000 order of the United States District Court for the Northern District of New York (Frederick J. Scullin, Jr., *Chief District Judge*) granting defendants' motion to dismiss under Fed. R. Civ. P. 12(b)(6).

Reversed in part, affirmed in part, and remanded.

KARL S. COPLAN, ESQ., Pace Environmental Litigation Clinic, Inc. (Basil B. Seggos, on the brief), White Plains, New York, *for Appellants.*

ELLEN S. RAVITCH, ESQ., Office of the Corporation Counsel of the City of New York (Michael D. Hess, Stephen J. McGrath, Hillary Meltzer, and William S. Plache, on the brief), New York, New York, *for Appellees.*

JOHN M. WALKER, JR., *Chief Judge*:

---

* The Honorable Richard D. Cuday of the United States Court of Appeals for the Seventh Circuit, sitting by designation.

Plaintiff environmental organizations Catskill Mountains Chapter of Trout Unlimited, Inc., Theodore Gordon Flyfishers, Inc., Catskill-Delaware Natural Water Alliance, Inc., Federated Sportsmen's Clubs of Ulster County, Inc., and Riverkeeper, Inc. (collectively "Catskill") appeal from an October 6, 2000 order of the United States District Court for the Northern District of New York (Frederick J. Scullin, Jr., *Chief District Judge*) granting a motion to dismiss under Fed. R. Civ. P. 12(b)(6) made by defendants City of New York, New York City Department of Environmental Protection, and Joel A. Miele. Sr., Commissioner of the Department of Environmental Protection (collectively "New York City" or "the City"). We conclude that some of Catskill's claims should not have been dismissed and those that were properly dismissed should have been dismissed without prejudice. Accordingly, we reverse in part, vacate in part, and remand for further proceedings consistent with this opinion.

BACKGROUND

Since before World War II, New York City has operated Schoharie Dam and Reservoir in the Catskill Mountains, to provide drinking water for New York City. Water is diverted south from the Schoharie Reservoir ("the Reservoir") through the Shandaken Tunnel ("the Tunnel") for several miles and released into Esopus Creek ("the Creek"), which in turn empties into Ashokan Reservoir. The transfer of water from the Reservoir to Esopus Creek and Ashokan Reservoir facilitates its delivery to New York City for use as drinking water.

Absent the tunnel, water leaving the Reservoir would flow north in Schoharie Creek, join the Mohawk River, and flow into the Hudson River. Water from Esopus Creek, on the other hand, makes its way southeast to the Hudson by

way of Ashokan Reservoir. Schoharie Reservoir and Esopus Creek are hydrologically connected only insofar as both are tributaries of the Hudson. Under natural conditions, water from the Schoharie Reservoir would never reach Esopus Creek.

Plaintiffs-appellants primarily represent recreational users of Esopus Creek. On November 20, 1998, Catskill sent a letter to the City, the United States Environmental Protection Agency ("EPA"), and the New York State Department of Conservation ("NYSDEC"), indicating Catskill's intention to file suit in district court under the federal Clean Water Act ("CWA," "the Act"), 33 U.S.C. § 1251 et seq. The Act permits aggrieved parties to bring civil action to enforce certain of the statute's requirements against violators. *See* 33 U.S.C. § 1365 ("Citizen suits.").

On March 31, 2000, Catskill filed a complaint in district court alleging that the City, as owner and owner and operator of the Schoharie Reservoir and Shandaken Tunnel, was is violation of 33 U.S.C. § 1311(a), which prohibits "the discharge of any pollutant" unless those discharges are conducted in accordance with a duly issued discharge permit. 33 U.S.C. § 1311(a) (citing permit requirement in 33 U.S.C. § 1342). Catskill alleged that the Tunnel discharges pollutants in the form of "suspended solids," "turbidity," and heat into Esopus Creek. They alleged that the suspended solids and turbidity are the result of earth-disturbing activities within the Reservoir's watershed that produce fine, red-clay sediments in the Reservoir. They further alleged that the discharges cause the Creek to violate state water quality standards for turbidity and temperature. Esopus Creek, Catskill contended, is naturally clearer and cooler than the water entering it from the Tunnel and supports "one of the premier trout fishing streams in the Catskill Region."

The City responded by moving under Fed. R. Civ. P. 12(b)(1) that the case be dismissed for want of jurisdiction because Catskill's notice-of-intent-to-sue letter ("NOI letter") was inadequate, and a proper NOI letter, they argued, is a jurisdictional prerequisite for a CWA citizen suit. The City also moved pursuant to Fed. R. Civ. P. 12(b)(6) that the case be dismissed because, although the City admits that it lacks a permit to discharge into Esopus Creek, it need not obtain one because its releases do not constitute "discharges" as defined by the CWA.

The district court denied the City's Rule 12(b)(l) motion, concluding that Catskill's NOI letter comported with the requirements of the Act and EPA regulations, but granted Rule 12(b)(6) motion. It found that, as a matter of law, the Reservoir and Tunnel did not effect an "addition" of a pollutant to the Creek, as required to trigger the CWA's permit requirement. *See* 33 U.S.C. § 1362(12) (defining "discharge of a pollutant" to mean "any addition of any pollutant to navigable waters from any point source"). Catskill appealed.

DISCUSSION

The City makes two arguments in support of the district court's dismissal. It first argues that the district court and this court lack subject matter jurisdiction over the case because Catskill's NOI letter, required by the CWA's citizen suit pro-vision, was inadequate and that a proper NOI letter is a pre-requisite to the court's subject-matter jurisdiction. Second, the City reiterates its successful argument in the district court, that the complaint failed to state a claim, because Shandaken Tunnel does not effect an "addition" of a pollutant, as required to constitute a "discharge" for which a permit must be sought.

We agree with the City that the NOI letter did not provide adequate notice of Catskill's eventual claim

regarding thermal discharges, but find the letter adequate to notify the City of the balance of Catskill's claims. The district court should have dismissed the thermal discharge claims without prejudice, however, and we therefore vacate the judgment with respect to those claims and remand with direction to dismiss them without prejudice to refiling after submission of a conforming NOI letter and after the 60-day delay required by the CWA. We also conclude that the district court erred in dismissing Catskill's complaint on the theory that Shandaken Tunnel does not "discharge" pollutants into Esopus Creek. We therefore reverse the judgment on the remaining claims and remand the case for further proceedings.

I. The Statutory Framework

We begin with an overview of the regulatory regime. The CWA's primary function is to regulate the discharge of pollutants into navigable waters. Although the Act contains the lofty goal of eliminating water pollutant discharges altogether, *see* 33 U.S.C. § 1251(a)(1), the regulatory regime it creates requires principally that discharges be regulated by permit, not prohibited outright. The Act mandates that "the discharge of any pollutant by any person shall be unlawful," 33 U.S.C. § 1311(a), "[e]xcept as in compliance" with other provisions of the statute, one of which establishes a permitting program, the "National Pollutant Discharge Elimination System" ("NPDES"), 33 U.S.C. § 1342. Section 1342 in turn provides for the issuance of discharge permits ("NPDES permits") that allow the holder to discharge pollutants at levels below thresholds incorporated in the permit. 33 U.S.C. § 1342(a); *see also* 40 C.F.R. § 122.1 et seq. In New York, the NPDES program is administered by NYSDEC and referred to as the State Pollution Discharge Elimination System ("SPDES"). *See* 33 U.S.C. § 1342(b) (authorizing state implementation of the NPDES program); N.Y. Envtl. Conserv. Law §§ 17-0105(13), 17-0701.

In the instant case, Catskill alleges that the City has been violating the CWA's unpermitted discharge prohibition by discharging water containing pollutants from Shandaken Tunnel into Esopus Creek without first obtaining an NPDES permit. The Act defines "discharge of a pollutant" to include "any addition of any pollutant to navigable waters from any point source." 33 U.S.C. § 1362(12). The Act defines "pollutant," "navigable waters," and "point source," 33 U.S.C. § 1362(6), (7), and (14) but the crux of this appeal is the meaning of "addition," which the Act does not define.

In addition to providing for enforcement by state agencies and the EPA, the CWA allows private parties to enforce its mandates, including the prohibition of unpermitted discharges in § 1311(a), against alleged violators in so-called "citizen suits." *See* 33 U.S.C. § 1365(a)(1), (f). An aggrieved plaintiff may bring a civil action for specific relief, such as the imposition of particular compliance measures, or civil penalties payable to the treasury, *see* 33 U.S.C. § 1365(a), and may recover attorney's fees, *see* 33 U.S.C. § 1365(d). At least 60 days prior to filing, however, the prospective plaintiff must provide notice of its claims to the potential defendant, the EPA, and the state in which the violations allegedly occurred. *See* 33 U.S.C. § 1365(b)(1)(A). If a competent state or federal enforcement agency brings a civil enforcement action against the defendant prior to the citizen complaints being filed, or an administrative enforcement proceeding prior to the plaintiff's NOI letter, the citizen suit is pre-empted and must be dismissed. *See* 33 U.S.C. §§ 1319(g)(6), 1365(b)(1)(B).

II. Catskill's Notice of Intent to Sue

The City claims that Catskill's NOI letter was inadequate because, while it was provided in a timely fashion to the proper parties, the letter failed to give the

City adequate notice of the claims that Catskill intended to bring. Catskill's complaint as filed alleged discharges of "a high l[illegible] of turbidity," "suspended solids," and "elevated tempe[illegible]es." Yet the NOI letter stated only that the City has discharged "pollutants in the form of Total Suspended Solids and Settleable Solids into the Esopus Creek." The City argues that by failing to provide notice of the claims of turbidity and thermal discharges ultimately alleged in the complaint, the NOI letter was fatally detective, requiring the suit to be dismissed. Although the district court did not rely on this theory in dismissing the complaint, we may affirm on a basis not relied on by the district court. *See Name.Space, Inc. v. Network Solutions, Inc.*, 202. F.3d 573, 584 (2d Cir. 2000). We conclude that the NOI letter failed to notify the City of Catskill's thermal discharge claims, but that fact does not invalidate Catskill's complaint in its entirety. Accordingly, we hold that those claims were properly dismissed.

The CWA does not describe the content of the required notice. but directs that "[n]otice . . . shall be given in such manner as the Administrator shall prescribe by regulation." 33 U.S.C. § 1365(b). The EPA has adopted such regulations. which mandate, inter alia, as follows:

> Notice regarding an alleged violation of an effluent standard or limitation or of an order with respect thereto, shall include sufficient information to permit the recipient to identify the specific standard, limitation, or order alleged to have been violated, the activity alleged to constitute a violation, the person or persons responsible for the alleged violation, the location of the alleged violation, the date or dates of such violation, and the full name, address, and telephone number of the person giving notice.

40 C.F.R. § 135.3(a). In the past, we have refused to "allow form to prevail over substance" in considering the content required of an NOI letter, and have looked instead to what the particular notice given may reasonably be expected to accomplish. *Dague v. City of Bur*lington. 935 F.2d 1343, 1354 (2d Cir. 1991), rev'd in part on other grounds, 505 U.S. 557 (1992).

The City contends that the EPA regulations require a potential plaintiff to include in an NOI letter each separate pollutant that will be alleged in a subsequent complaint as the. basis of a violation of the Act. At least one circuit has adopted such a rule. See Pub. Interest Research Group v. Hercules, 50 F.3d 1239, 1248 (3d Cir. 1995). On this theory, for example, a plaintiff could not bring suit for discharges of mercury, lead, and copper if the NOI letter alleged violations based only on discharges of copper. In that case, the claims of copper violations would stand, but the claims based on mercury and lead discharges would need to be dismissed. We agree with the City that such a rule logically follows from the regulatory scheme and therefore adopt it.

The EPA regulations require that an NOI letter "include sufficient information to permit the recipient to identify the specific standard, limitation, or order alleged to have been violated, [and] the activity alleged to constitute a violation." 40 C.F.R. § 135.3(a). We believe that to be "sufficient," the information provided must include the pollutant alleged to be the basis of a violation subsequently alleged in the complaint.

Because each discharge of a pollutant represents a distinct violation of the Act, *see* 33 U.S.C. § 1311(a) ("the discharge of any pollutant . . . shall be unlawful"); *Atl. States Legal Found., Inc. v. Tyson Foods, Inc.*, 897 F.2d 1128, 1138 n.19 (11th Cir. 1990), identification in an NOI letter of a pollutant allegedly discharged is essential to

provide adequate notice of the alleged violation. Discharges of mercury and lead, for instance, could he distinct violations, each subject to penalties of up to $25,000 per day. *See* 33 U.S.C.§§ 1319(d), 1365(a). To provide adequate notice of each violation that will be targeted in the citizen suit, the NOI letter must differentiate pollutants from nonpollutants and one pollutant from another. The rationale for such a rule is most apparent in the context of a suit alleging discharges in excess of NPDES permit limitations, in which the defendant may he discharging some pollutants lawfully and others unlawfully. To enable the defendant to identify each violation that will be alleged, then, the NOI letter must specify each pollutant unlawfully discharged that will be alleged in a subsequent complaint. The principle applies equally where, as here, the defendant has failed altogether to obtain a permit. To state a claim based on unpermitted discharges, the plaintiff must allege some pollutant that was discharged without a permit. It follows, then, that to the extent the plaintiff intends to prosecute multiple violations involving multiple pollutants, each pollutant that will be the basis of such a claim must be set forth in the NOI letter.

The policies underlying the NOI requirement are furthered by this rule The notice and 60-day delay requirements allow a potential defendant to identify its own violations and bring itself into compliance voluntarily, thus making a costly lawsuit unnecessary. *See Hallstrom v. Tillamlook County*, 493 U.S. 20, 29-30 (1989); *Dague*, 935 F.2d at 1351; *see also Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Found.*, 484 U.S. 49 (1987) (holding that if the defendant ceases its violations prior to the filing of the complaint, the action is barred). Specific knowledge of the pollutants allegedly discharged unlawfully makes it easier for the defendant to promptly rectify the problem. *Cf. Atl. States Legal Found., Inc. v. Stroh Die Casting Co.*,

116 F.3d 814, 819-20 (7th Cir. 1997) ("In practical terms, the notice must be sufficiently specific to inform the alleged violator about what it is doing wrong, so that it will know what corrective actions will avert a lawsuit. . . . The key to notice is to give the accused company the opportunity to correct the problem.").

The notice and delay requirements are also designed to allow the enforcer of first resort, the EPA or the appropriate state agency, to bring its own enforcement action, *see Hallstrom*, 493 U.S. at 29, which would preempt the citizen lawsuit, *see* 33 U.S.C. § 1365(b)(1)(B). Inclusion of each pollutant forming the basis of a alleged violation better allows enforcement agencies to identify and prosecute a potential defendant's violations, giving effect to Congress's intention that citizen enforcers supplement, not suppl*ant, public enforcement. See id. (citing Gwaltney, 484 U.S. at 60).*

Accordingly, we hold that an NOI letter must identify with reasonable specificity each pollutant that the defendant is alleged to have discharged unlawfully. Failure to do so will justify a district court's dismissing claims based on pollutants not properly noticed.

Turning to the case at hand, we conclude that Catskill's NOI letter adequately notified the City of some but not all of the violations subsequently alleged in the complaint. The district court found, and Catskill argues on appeal, that inclusion of "suspended solids" and "settleable solids" was sufficient to notify the City of Catskill's claims of turbidity and thermal discharges, because of the logical and empirical associations between suspended solids on the one hand and turbidity and thermal discharges on the other. We agree with respect to Catskill's claims of turbidity discharges, but not with respect to thermal discharges.

Turbid water, by definition, is water carrying high levels of solids in suspension. The presence of elevated levels of suspended solids inevitably produces turbidity. "Turbid" is defined as "having the lees or sediment disturbed: thick or opaque with matter in suspension." *Webster's Third New International Dictionary* 2464 (1981). Water cannot be turbid without suspended solids, and some level of turbidity is inherent where suspended solids are present. Because each logically depends on the other, notice of discharges of suspended solids is sufficient to notify of an eventual claim based on discharges of "turbidity."

On the other hand, the relationship between suspended solids and temperature is one of association, not identify. To be sure, increased turbidity often produces increased water temperature. Particles suspended in water absorb heat, raising the temperature of the water. But the presence of suspended solids does not inevitably raise water temperature. The effect of suspended solids on temperature depends on a third variable, radiant heat, usually in the form of sunlight. Increased turbidity in a cold, dark place may not affect the temperature of the water at all, or may do so only infinitesimally, because no source of radiant heat is present. As a result, unlike suspended solids and turbidity, there is no necessary relationship between suspended solids and increased temperature. The relationship is only one of frequent association under ordinary circumstances.

Accordingly, to be sufficient, the allegations in an NOI letter must suggest that these ordinary circumstances were also prevalent. Where alleged circumstances indicate that suspended solids and increased temperature are very likely to be associated, notice of suspended solids may be sufficient to notify a reasonable person of a thermal discharge claim. In the instant case, Catskill's NOI letter does not state that such circumstances were prevalent.

For the foregoing reasons, we hold that Catskill's claims of unpermitted thermal discharges were properly dismissed under Rule 12(b)(6). However, those claims should have been dismissed without prejudice. Thus we vacate so much of the judgment as dismissed Catskill's thermal discharge claims with prejudice and remand those claims with direction that they be dismissed without prejudice to refilling after full compliance with 33 U.S.C. 1365(b)(1)(A).

III Interbasin Transfer as a "Release" Under the CWA

As we have noted, the CWA prohibits, unless otherwise allowed by permit, "the discharge of any pollutant," 33 U.S.C. 1311(a), which the Act defines to mean "any addition of any pollutant to navigable waters from any point source," 33 U.S.C. § 1362(12). The statute does not define "addition." The City argues that the release of water from Schoharie Reservoir into Esopus Creek is not an "addition," citing *National Wildlife Federation v. Gorsuch*, 693 F.2d 156 (D.C. Cir. 1982), and *National Wildlife Federation v. Consumers Power Co.*, 862 F.2d 580 (6th Cir. 1988), both of which accorded substantial deference to the EPA's position that the CWA's discharge permit requirement does not apply to discharges from dams. Catskill counters that the *Gorsuch* and *Consumers Power* courts accorded unjustified deference to the EPA's interpretation of "addition," that the cases are distinguishable on their facts, and that the City's conduct here qualifies as an "addition" under the plain meaning of that word. We agree with Catskill and accordingly reverse the district court and remand for further proceedings on Catskill's remaining claims.

A. The EPA's Position and the Proper Standard of Deference

In several policy statements made in opinion letters and reports to Congress in the 1980s and 1980s, the EPA took the position that dam releases should not be considered "discharges" under the CWA and thus NPDES permits would not be required for those releases.[1] *See Gorsuch*, 693 F.2d at 167-69. This position was never formalized in a notice-and-comment rulemaking or formal adjudication under the Administrative Procedure Act, 5 U.S.C. §§ 553, 554, although the EPA subsequently reiterated its position in the *Gorsuch* and *Consumers Power* cases, as a defendant and amicus curiae, respectively. *See Consumers Power*, 862 F.2d at 583; *Gorsuch*, 693 F.2d at 165. Both courts rested their decisions on the conclusion that the EPA position deserved substantial deference and was reasonable. Given subsequent Supreme Court decisions governing judicial deference to federal agencies' constructions of the statutes that they implement, we hold that the EPA position is due less deference than that accorded it by the *Gorsuch* and *Consumers Power* courts.

In 1982, in *Gorsuch*, the District of Columbia Circuit deferred to the EPA's position that dam releases wer not "additions" under the CWA, which it upheld as a reasonable construction of the statute. The *Gorsuch* plaintiffs had sued the EPA under 33 U.S.C. § 1365(a)(2), seeking a declaration that the EPA had a nondiscretionary duty to require NPDES permits from dam operators. After an extensive exegesis of the CWA's statutory text, structure, and legislative history, the court concluded that the EPA could reasonably conclude that dam releases were

---

[1] The original documents in which the EPA staked out its position were not included in the filings before this court and were not published in the usual sources of administrative law, the *Code of Federal Regulations* and the *Federal Register*. We accordingly base our discussion of the EPA's position on that included in the District of Columbia Circuit's comprehensive opinion in *Gorsuch*.

not "additions." *See* 693 F.2d at 170-83. Notwithstanding the court's extensive investigation of legislative intent, its relied ultimately on deference to the agency:

> [W]e emphasize the narrowness of our decision. It is not our function to decide whether EPA's interpretation . . . is the best one or even whether it is more reasonable than the Wildlife Federation's interpretation. We hold merely that EPA's interpretation is reasonable, not inconsistent with congressional intent, and entitled to great deference; therefore, it must be upheld.

693 F.2d at 183. In 1988, the Sixth Circuit reached the same conclusion. *See* Consumers *Power*, 862 F.2d at 584-87.

If the EPA's position had been adopted in a rulemaking or other formal proceeding, deference of the sort applied by the *Gorsuch* and *Consumers Power* courts might be appropriate. Instead, the EPA's position is based on a series of informal policy statements made and consistent litigation positions taken by the EPA over the years, primarily in the 1970s and 1980s. Recent Supreme Court cases emphasize that such agency statements do not deserve broad deference of the sort accorded by the *Gorsuch* and *Consumers Power* courts.[2] *See United States v. Mead Corp.*, 121 S. Ct. 2164 (2001); *Christensen v. Harris County*, 529 U.S. 576 (2000). In *Christensen*, the Supreme Court held that "[i]nterpretations such as those in opinion letters – like interpretations contained in policy

---

[2] *Consumers Power* expressly applied the standard of deference elaborated in *Chevron U.S.. Inc. v. Natural Resources Defense Council*, 467 U.S. 837 (1984). *See* 862 F.2d at 584-85. *Gorsuch*, which predated *Chevron*, applied essentially the same degree of deference. *See* 693 F.2d at 166-67.

statements, agency manuals, and enforcement guidelines, all of which lack the force of law – do not warrant *Chevron*-style deference." 529 U.S. at 587. "Instead," the Court continued, "interpretations contained in formats such as opinion letters are 'entitled to respect' . . . but only to the extent that those interpretations have the 'power to persuade.'" *Id.* (citation omitted). The Court consequently held that an opinion letter by the Department of Labor deserved only this form of limited deference in its interpretation of a provision of the Fair Labor Standards Act. *See id.*

Like positions taken by the Department of Labor in its opinion letter in *Christensen*, the EPA position on dam discharges has never been articulated in circumstances that would give it the "force of law." *Gorsuch* describes only a series of letters and several presentations for Congress in reports and testimony that outlined the EPA's position. *See Gorsuch*, 693 F.2d at 167-69. None of these sources come close to the sort of formal, binding articulation of an agency's views that would justify Chevron deference after *Christensen*. That the EPA later relied on its position in litigation does not alter our analysis; a position adopted in the course of litigation lacks the indicia of expertise, regularity, rigorous consideration, and public scrutiny that justify *Chevron* deference. *See Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 212 (1988); *Ball v. Memphis Bar-B-Q Co.*, 228 F.3d 360, 365 (4th Cir. 2000); *S. Utah Wilderness Alliance v. Dabney*, 222 F.3d 819, 828 (10th Cir. 2000).

However, as *Mead* and *Christensen* make clear, courts do not face a choice between *Chevron* deference and no deference at all. Administrative decisions not subject to *Chevron* deference may be entitled to a lesser degree of deference: the agency position should be followed to the extent persuasive. *See Mead*, 121 S. Ct. at 2175-76 (citing *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944). For

the reasons that follow, however, we do not find the EPA's position to be persuasive.

B. Defining "Addition"

The EPA's position, upheld by the *Gorsuch* and *Consumers Power* courts, is that for there to be an "addition," a "point source must *introduce* the pollutant into navigable water from the outside world." *Gorsuch*, 693 F.2d at 165. We agree with this view provided that "outside world" is construed as any place outside the particular water body to which pollutants are introduced. Given that understanding of "addition," the transfer of water containing pollutants from one body of water to another, distinct body of water is plainly an addition and thus a "discharge" that demands an NPDES permit.

Both *Gorsuch* and *Consumers Power* essentially involved the recirculation of water, without anything added "from the outside world." Such recirculation, they concluded, could not be an "addition." In *Gorsuch*, water was released from a reservoir through a dam to the stream below. Plaintiffs complained that such a release amounted to a regulated discharge under the Act, requiring a permit. The reservoir above the dam and the stream below, at least arguably, were sufficiently the "same" water that the release might not be considered an "addition"; nothing was introduced to the water that was not, in some sense, already there. See 693 F.2d at 174-75.

In *Consumers Power*, the defendant had withdrawn water from Lake Michigan, along with some surprised fish, for hydroelectric power generation. The water and fish were then returned to the Lake after passing through hydroelectric generators, which pureed some of the fish. The court found that returning the fish to the Lake, albeit in a different form, was not an "addition" because the fish had already been there. *See* 862 F.2d at 586. Indeed, the court

concluded that "[t]he water which passes through the [defendant's hydropower works] never loses its status as water of the United States." *Id.* at 589. The navigable water was recirculated, but nothing was added. The Sixth Circuit therefore also concluded that the releases from the defendant's hydropower works were not "introduced from the outside world." *See id.* at 586. Beyond *Consumers Power,* several cases from other circuits, despite having found "additions" to have occurred, in dicta reiterated the *Gorsuch* holding. *See, e.g., Comm. To Save Mokelumne River v. E. Bay Mun. Util. Dist.*, 13 F.3d 305, 308-09 (9th Cir. 1993); *United States v. Law*, 979 F.2d 977, 979 (4th Cir. 1992) ("Where 'pollutants' exist[ ] *in the waters of the United States* before contact with these facilities, the mere diversion in the flow of the waters [does] not constitute 'additions' of pollutants to the water.").

The *Gorsuch* and *Consumers Power* decisions comport with the plain meaning of "addition" assuming that the water from which the discharges came is the same as that to which they go.[3] If one takes a ladle of soup from a pot, lifts it above the pot, and pours it back into the pot, one has not "added" soup or anything else to the pot (beyond, perhaps, a *de minimis* quantity of airborne dust that fell into the ladle). In requiring a permit for such a "discharge," the EPA might as easily require a permit for Niagra Falls.

The present case, however, strains past the breaking point the assumption of "sameness" made by the *Gorsuch* and *Consumers Power* courts. Here, water is artificially diverted from its natural course and travels several miles

---

[3] We need not and do not decide whether those courts were correct in accepting that the source and destination waters were identical and thus whether we would reach their conclusions if presented with the same facts.

from the Reservoir through Shandaken Tunnel to Esopus Creek, a body of water utterly unrelated in any relevant sense to the Schoharie Reservoir and its watershed. No one can reasonably argue that the water in the Reservoir and the Esopus are in any sense the "same," such that "addition" of one to the other is a logical impossibility. When the water and the suspended sediment therein passes from the Tunnel into the Creek, an "addition" of a "pollutant" from a "point source" has been made to a "navigable water," and the terms of the statute are satisfied.

In *Dague v. City of Burlington*, 935 F.2d 1343 (2d Cir. 1991), we implicitly held the release of polluted water from one water body to a distinct, less-polluted water body to be an addition of pollutants to the latter. We concluded that a "discharge" had occurred where leachate from a landfill entered a pond and thereafter water from the pond, polluted with the leachate, flowed through a culvert into a surrounding marsh. We held that (1) the pond and marsh were different navigable waters; (2) the culvert was the relevant point source; and (3) the release of pond water through the ? was a "discharge." We thus necessarily implied that the transfer of water from the pond to the marsh was an "addition" *Id* at 1354-55. We also expressly rejected the defendant's argument that the water flowing from pond to marsh was not an "addition," noting that "[u]nder this argument, pollutants would be 'added' only when they are introduced into navigable waters for the first time." *Id*. at 1354.

The First Circuit reached a similar conclusion in *Dubois v. U.S. Dep't of Agriculture*, 102 F.3d 1273 (1st Cir. 1996). In that case, a ski resort operator on Department of Agriculture property pumped water without a permit from a polluted river into a less-polluted pond to operate its snowmaking equipment. The court held that the transfer of polluted water from one water body to a distinct water body constitutes an "addition" of pollutants to the

destination water body. The court emphasized that the two bodies of water, for all relevant purposes, were distinct: although water naturally flowed from the pond into the river, water would never naturally flow from river to pond. That difference made the pumping an "addition." *See id.* at 1296-97. The court distinguished *Gorsuch* and *Consumers Power* as involving movement of water within the same water body. *See id.* at 1299.

The City also argues that "addition" draws meaning from its association with the phrase "from point source." This view misunderstands the import of the term "point source," which does not necessarily refer to the place where the pollutant was created but rather refers only the proximate source from which pollutant is directly introduced to the destination water body. A pipe from a factory draining effluent into a navigable water is a point source, but the factory itself is not. This is clear from the text of the Act, which defines "point source," in relevant part, as any discernible, confined and discrete conveyance, including but not limited to any pipe, ditch, channel, tunnel, conduit, well, discrete fissure, container, rolling stock, concentrated animal feeding operation, or vessel or other floating craft, from which pollutants are or may be discharged.

33 U.S.C. § 1362(14). Under most circumstances, a "pipe, ditch, channel, tunnel, [or] conduit" is unlikely to have created the pollutants that it releases, but rather transports them from their original source to the destination water body.

As a "tunnel," Shandaken Tunnel plainly qualifies as a point source. The tunnel itself need not have created the pollution; it is enough that it conveys the pollutants from their original source to the navigable water. *See United States v. Plaza Health Labs., Inc.*, 3 F.3d 643, 646 (2d Cir. 1993). The City's proposed interpretation of "from a point

source" is inconsistent with the CWA's definition of a point source.

Given the ordinary meaning of the CWA's text and our holding in *Dague*, we cannot accept the *Gorsuch* and *Consumers Power* courts' understanding of "addition," at least insofar as it implies acceptance of what the *Dubois* court called a "singular entity" theory of navigable waters, in which an addition to one water body is deemed an addition to all of the waters of the United States. *See Dubois*, 102 F.3d at 1296-97. We properly rejected that approach in *Dague*. Such a theory would mean that movement of water from one discrete water body to another would not be an addition even if it involved a transfer of water from a water body contaminated with myriad pollutants to a pristine water body containing few or no pollutants. Such an interpretation is inconsistent with the ordinary meaning of the word "addition."

Even if we were to conclude that the proper application of the statutory text to the present facts was sufficiently ambiguous to justify reliance on the legislative history of the statute, *see Blum v. Stenson*, 465 U.S. 886, 896 (1984), that source of legislative intent would not help the City. The legislative history is silent on the meaning of "addition." *See Gorsuch*, 693 F.2d at 175. Instead, the City relies principally on evidence from other provisions of the statute that Congress sought (1) to target industrial and municipal wastes specifically, *see Plaza Health Labs.*, 3 F.3d at 647, and (2) to leave the regulation of water supply—and therefore dam and reservoir operations—to the states, *see* 33 U.S.C. § 1251(g) ("It is the policy of Congress that the authority of each State to allocate quantities of water within its jurisdiction shall not be superseded, abrogated, or otherwise impaired by this [Act].").

Yet like many complex statutes (and the CWA is among the most complex), the CWA balances a welter of consistent and inconsistent goals. In contrast with the policies cited by the City, the CWA also expressly includes a broad and uncompromising policy of "restor[ing] and maintain[ing] the chemical, physical, and biological integrity of the Nation's waters." 33 U.S.C. § 1251(a). Artificially transferring water and pollutants between watersheds as the City has done here might well interfere with that integrity, as Catskill has alleged. Moreover, in the past we have applied the Act's proscriptions beyond industrial discharges. *See Concerned Area Residents for the Env't v. Southview Farm*, 34 F.3d 114 (2d Cir. 1994) (involving discharges of agricultural waste).

In any event, none of the statute's broad purposes sways us from what we find to be the plain meaning of its text. *Cf. Plaza Health Labs.*, 3 F.3d at 647 ("The narrow questions posed by this case . . . may not be resolved merely by simple reference to [the CWA's] admirable goal[s].") Where a statute seeks to balance competing policies, congressional intent is not served by elevating one policy above the others, particularly where the balance struck in the text is sufficiently clear to point to an answer. We find that the textual requirements of the discharge prohibition in § 1311(a) and the definition of "discharge of a pollutant" in § 1362(12) are met here.

CONCLUSION

The judgment of the district court is hereby reversed in part, vacated in part, and the case is remanded. We vacate so much of the judgment as dismissed Catskill's thermal discharge claims and remand the direction that those claims be dismissed without prejudice to refilling after full compliance with 33 U.S.C. § 1365(b) (1) (A). The remainder of the judgment dismissing the complaint is

reversed and remanded for further proceedings consistent with this opinion. Costs are awarded to the appellants.

ORDER OF THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF NEW YORK, DATED JUNE 4, 2002

REPRODUCED FOLLOWING

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

---------- x

CATSKILL MOUNTAINS CHAPTER OF TROUT UNLIMITED, INC., THEODORE GORDON FLYFISHERS, INC., CATSKILLDELAWARE NATURAL WATER ALLIANCE, INC., FEDERATED SPORTSMEN'S CLUBS OF ULSTER COUNTY, INC., and RIVERKEEPER, INC.,

Plaintiff(s),

1:00-CV-511 (FJS/RFT)

-against-

THE CITY OF NEW YORK, NEW YORK CITY DEPARTMENT OF ENVIRONMENTAL PROTECTION, and JOEL A. MIELE, SR., COMMISSIONER OF DEPARTMENT OF ENVIRONMENTAL PROTECTION,

Defendant(s).

---------- x

APPEARANCES	OF COUNSEL
PACE ENVIRONMENTAL LITIGATION CLINIC, INC. 78 North Broadway White Plains, New York 10603 Attorneys for Plaintiffs	**KARL S. COPLAN, ESQ.**

CITY OF NEW YORK OFFICE OF CORPORATION COUNSEL 100 Church Street New York, New York 10007-2601 Attorneys for Defendants	**WILLIAM PLACHE, ESQ.** **HILARY MELTZER, ESQ.**
SCULLIN, Chief Judge	

U.S. DISTRICT COURT-N.D. OF N.Y.
FILED JUNE 4, 2002
LAWRENCE K. BAERMAN, CLERK-SYRACUSE

ORDER

Plaintiffs commenced this action under the citizen suit provision of the Clean Water Act ("CWA"), 33 U.S.C. § 1365, to enjoin Defendants from polluting the Esopus Creek, a world-class trout stream, with highly turbid, muddy water, and for civil penalties for past violations.

Presently before the Court is PIaintiffs' motion for partial summary judgment declaring that Defendants are in violation of the CWA, 33 U.S.C. § 1311(a), every day that Shandaken Tunnel is in operation and that Defendants have violated CWA § 1311(a) on at least 347 days between

February 1, 1995 and December 30, 1998. On May 29, 2002, the Court heard oral argument with respect to this motion. At that time, the Court orally granted Plaintiffs' motion for partial summary judgment and advised counsel that a written Order would be forthcoming. The following constitutes the Court's written decision with respect to the pending motion.

The CWA prohibits the addition of any pollutant into navigable waters from any point source by an person without a permit. *See* 33 U.S.C. §§ 1311(a), 1362(12). Violators of this prohibition are strictly liable. *See Connecticut Fund for the Env't, Inc. v. Upjohn Co., 660* F. Supp. 1397, 1409 (D. Conn. 1987).

In the present case, there is no dispute that Esopus Creek is a navigable water, that Defendants are persons within the meaning of the CWA, and that Defendants do not have a permit. Nor can there be any dispute that the Shandaken Tunnel is a point source and that suspended sediment constitutes a pollutant now that the Second

Circuit has held that "[w]hen the water and the suspended sediment therein pass from the [Shandaken] Tunnel into the [Esopus] Creek, an 'addition' of a 'pollutant' from a 'point source' has been made to a 'navigable water,' and the terms of the statute are satisfied." *Catskill Mountains Chapter of Trout Unlimited, Inc. v. City of N.Y.*, 273 F.3d 481, 492 (2d Cir. 2001).

Although Defendants filed papers in opposition to Plaintiffs' motion, they conceded in their papers as well as at oral argument that "[unnder the Second Circuit's decision, because the City has discharged and continues to discharge water containing suspended solids and turbidity through the Shandaken Tunnel into Esopus Creek, and because the City has no Clean Water permit for those discharges, . . . it may be viewed as strictly liable under the Act." See Defendants' Memorandum of Law at 2.

Given that the Second Circuit has already determined that whenever Defendants divert water and suspended sediment through the Shandaken Tunnel into

Esopus Creek, "the terms of the statute have been satisfied," Catskill Mountains Chapter of Trout Unlimited, Inc., 273 F.3d at 492, and Defendants' concession that in light of the Second Circuit's decision they have violated the CWA, the Court concludes that Plaintiffs are entitled to partial summary judgment with respect to the issue of liability. Accordingly, the Court hereby

ORDERS that Plaintiffs' motion for partial summary judgment with regard to the issue of liability is **GRANTED;** and the Court further

ORDERS that the parties are to contact Magistrate Judge Treece's chambers within **ten days** of the date of this Order to schedule a conference to discuss how this action can be expedited to ensure that a trial on the issue of damages can be scheduled as soon as possible.

IT IS SO ORDERED.

Dated: June 4, 2002
Syracuse, New York

s/_____

Frederick J. Scullin, Jr.
Chief United States District Judge

MEMORANDUM-DECISION AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF NEW YORK, DATED FEBRUARY 6, 2003

(Reported at 244 F. SUPP. 2d 41)

REPRODUCED FOLLOWING

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

---------- x

CATSKILL MOUNTAINS CHAPTER OF TROUT UNLIMITED, INC., THEODORE GORDON FLYFISHERS, INC., CATSKILLDELAWARE NATURAL WATER ALLIANCE, INC., FEDERATED SPORTSMEN'S CLUBS OF ULSTER COUNTY, INC., and RIVERKEEPER, INC.,

Plaintiff(s),

1:00-CV-511 (FJS/RFT)

-against-

THE CITY OF NEW YORK, NEW YORK CITY DEPARTMENT OF ENVIRONMENTAL PROTECTION, and JOEL A. MIELE, SR., COMMISSIONER OF DEPARTMENT OF ENVIRONMENTAL PROTECTION,

Defendant(s).

---------- x

APPEARANCES	OF COUNSEL
PACE ENVIRONMENTAL LITIGATION CLINIC, INC. 78 North Broadway White Plains, New York	**KARL S. COPLAN, ESQ.** **MEGAN BRILLAULT, Legal Intern** **LISA COX, Legal**

10603 Attorneys for Plaintiffs	**Intern** **NICOLE PARISI-SMITH, Legal Intern** **JOHN PAUL, Legal Intern**
CITY OF NEW YORK OFFICE OF CORPORATION COUNSEL 100 Church Street New York, New York 10007-2601 Attorneys for Defendants	**WILLIAM PLACHE, ESQ.** **HILARY MELTZER, ESQ.** **JANET SIEGEL, ESQ.**
SCULLIN, Chief Judge	

U.S. DIST. COURT-N.D. OF N.Y.
FILED FEBRUARY 6, 2003
LAWRENCE K. BAERMAN

MEMORANDUM-DECISION AND ORDER

I. INTRODUCTION

On November 20, 1998, Plaintiffs served Defendants, the New York State Department of Environmental Conservation ("DEC"), and the Environmental Protection Agency ("EPA") with a Notice of Intent to Sue. On March 31, 2000, Plaintiffs filed their complaint in this action. *See* Dkt. No. 1. On October 6, 2000, this Court dismissed Plaintiffs' turbidity and thermal discharge claims for failure to state a claim. *See* Dkt. No.

19. Thereafter, on October 21, 2001, the Second Circuit reversed in part this Court's decision and remanded this action for further proceedings. *See* Dkt. No. 32.

Subsequently, Plaintiffs filed a motion for partial summary judgment, seeking a declaration that Defendants had violated the Clean Water Act ("CWA"), 33 U.S.C. § 1311(a), by discharging turbidity and suspended solids from the Shandaken Tunnel into the Esopus Creek without a permit, including 347 days between February 1, 1995 and December 30, 1998.[1] *See* Dkt. No. 44. On June 4, 2002, the Court granted Plaintiffs' motion for summary judgment on the issue of liability and directed the parties to contact Magistrate Judge Treece's chambers to discuss how this action could be expedited to ensure that a trial on the issue of damages could be scheduled as soon as possible. *See* Dkt. No. 66.

---

[1] According to Defendants' Exhibit "D-17," the Shandaken Tunnel was in operation on 1,015 days between February 1, 1995 and December 30, 1998.

The Court held a bench trial commencing on January 8, 2003, to determine the amount of civil penalties, if any, that Defendants should be required to pay pursuant to 33 U.S.C. § 1319(d), and what form of injunctive relief, if any, the Court should impose upon Defendants for operating the Shandaken Tunnel without a SPDES permit in violation of the CWA. Pursuant to Rule 52(a) of the Federal Rules of Civil Procedure, the following constitutes the Court's findings of fact and conclusions of law with respect to these issues.

II. DISCUSSION

A. Findings of Fact

Plaintiffs Catskill Mountains Chapter of Trout Unlimited, Inc. ("CMCTU"), Theodore Gordon Flyfishers, Inc. ("TGF"), Catskill-Delaware Natural Water Alliance ("CDNWA"), Federated Sportsmen's Clubs of Ulster County, Inc. ("FSC"), and Riverkeeper, Inc., are not-for-profit corporations organized under the laws of the State of New York. Members of CMCTU, TGF, CDNWA, and FSC

live near the Esopus Creek and enjoy the Esopus Creek for numerous activities, including, but not limited to, flyfishing. Riverkeeper, whose mission is to protect the environmental resources of the Hudson River and its tributaries, including the Esopus Creek, has members who fish in the Esopus Creek.

At trial, Bert Darrow, a member of TGF and CMCTU and a professional flyfisherman and licensed flyfishing guide, testified that prior to 1996 he used the Esopus Creek as his primary fishing location for personal as well as business uses. However, since that time, the turbid water in the Esopus Creek has made fishing difficult because the trout cannot see cast lines and flies and dangerous because the fishermen cannot see the bottom of the Creek. As a result, he does not fish in the Esopus Creek very often, and he takes his clients to other streams.

Ron Urban and Bruce Duffy, who are also members of CMCTU, testified that they have observed a significant increase in turbidity in the Esopus Creek below the

Shandaken Tunnel and that they find that the turbidity is visually offensive and creates unsafe conditions for wading. Brother John Farrell, a member of ESC, has fished in the Esopus Creek since the mid-1980s. He testified that since 1996 he has observed that the Esopus Creek below the Shandaken Tunnel has become more turbid, causing it to be unsafe and affecting his aesthetic enjoyment of the Esopus Creek. He also testified that he very seldom fishes below the Shandaken Tunnel, except with an older friend who lives on the Esopus Creek in that area.

Defendant City of New York, by and through Defendant New York City Department of Environmental Protection ("NYCDEP"), is the owner and operator of the largest unfiltered drinking water supply in the United States.[2] Defendants provide high quality water to more than nine million residents of New York State, including eight million people who live in New York City and approximately one million people who live in Westchester,

Putnam, and Rockland Counties. Defendant NYCDEP conducts and oversees operation of the Shandaken Tunnel.

The Catskill water supply system provides approximately forty percent of New York City's daily drinking water needs under normal operating conditions. This system consists of two reservoirs, the Ashokan and the Schoharie. The Shandaken Tunnel began operating in 1924. The water in the Schoharie Reservoir is diverted to the Esopus Creek, the main tributary to the Ashokan Reservoir, through the Shandaken Tunnel. The Shandaken Tunnel has a flow capacity of up to 650 million gallons per day. When the Shandaken Tunnel is in operation, water from the Schoharie Reservoir enters the Shandaken Tunnel through an intake channel on or in the bed of the Schoharie Reservoir. The Shandaken Tunnel runs approximately eighteen miles from the intake structure at the Schoharie Reservoir to the portal from which it discharges into the Esopus Creek eleven miles upstream of the Ashokan

---

[2] Defendant Joel Miele is the Commissioner of NYCDEP.

Reservoir. The Catskill aqueduct, which moves water from the Ashokan Reservoir to New York City's Kensico Reservoir in Westchester County, has a capacity of up to 610 million gallons per day. Two aqueducts bring water from the Kensico Reservoir into New York City.

The Catskill Mountains are characterized by extensive deposits of silts and clays that are continuous for miles in the valleys through which streams tributary to the Catskill reservoirs now flow. The Ashokan Reservoir is designed to provide settling time to minimize the turbidity of Catskill water by the time it enters the Catskill aqueduct on its way to New York City so that the water entering New York City's distribution system meets drinking water standards. The water discharged through the Shandaken Tunnel into the Esopus Creek is frequently substantially, visibly more turbid and higher in suspended solids than the receiving water because of the system design and the geology of the Schoharie drainage basin. The suspended solids present in the Schoharie Reservoir are caused, at

least in part, by erosion in the Schoharie Watershed, including erosion resulting from land disturbance from human activities.

The New York State Department of Environmental Conservation ("DEC") has designated the Esopus Creek, between the outlet of the Shandaken Tunnel and the inlet of the Ashokan Reservoir, as a class A(T) stream. The water quality standard for discharges of turbidity to a class A(T) stream is "no increase that will cause a substantial visible contrast to natural conditions." N.Y. Comp. Codes R. & Regs. tit. 6, § 703{2) (2002).

Pursuant to 33 U.S.C. § 1342, the Administrator of the EPA has delegated to the State of New York the authority to issue State Pollutant Discharge Elimination System ("SPDES") permits to dischargers in this State. DEC is the state agency that administers the SPDES program in New York. Defendants do not have a CWA permit or a SPDES permit for the operation of the Shandaken Tunnel, and, until the Second Circuit's decision

on October 21, 2001, they maintain that they believed that they did not need a SPDES permit to operate the Shandaken Tunnel. Defendants operated the Shandaken Tunnel without a permit and, thus, in violation of the CWA on a total of 2,326 days from February 1, 1995 to December 31, 2002. See Defendants' Exhibit "D-17;" Letter to Court dated January 23, 2003.[3]

B. Conclusions of Law

1. Standing

An organization has standing to bring an action on behalf of its members if it can establish that "its members would otherwise have standing to sue in their own right, the interests at stake are germane to the organization's purpose, and neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit." *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs.*

[3] After the trial was completed, the Court requested that Defendants submit a record of the discharges through the Shandaken Tunnel for the calendar year 2002, rather than rely upon an approximation based upon prior history. Defendants responded to the Court's request with the January 23, 2003 letter and attached chart.

(TOC), Inc., 528 U.S. 167, 181 (2000) (citation omitted). To establish individual standing a person must show

> (1) [that he/she] has suffered an "injury in fact" that is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical; (2) the injury is fairly traceable to the challenged action of the defendant; and (3) it is likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision.

Id. at 180-81.

In the present case, the testimony of Bert Darrow, Ron Urban, Bruce Duffy, and Brother John Farrow establishes that Plaintiffs have standing to bring this suit on behalf of their members. Each of these individuals testified that, at least since 1996, Defendants' discharge of water through the Shandaken Tunnel into the Esopus Creek has interfered with their enjoyment of the Esopus Creek -- both aesthetically and in their ability to fish safely in the Esopus Creek --and, in the case of Bert Darrow, has interfered with his business as a fly-fishing guide. Such injury is both concrete and particularized as well as fairly traceable to Defendants' actions. In addition, a decision in Plaintiffs'

favor - i.e., requiring Defendants to reduce the turbidity of the water that flows through the Shandaken Tunnel into the Esopus Creek - will redress their injuries.

Accordingly, based upon the testimony of Plaintiffs' members, the Court concludes that Plaintiffs have standing to bring suit against Defendants under the citizen-suit provision of the CWA.[4]

2. Civil Penalties

As noted, this Court previously determined, upon remand from the Second Circuit, that Defendants had violated the CWA.[5] Thus, the only remaining issue is the amount of civil penalties and the nature of the injunctive relief that the Court should assess against Defendants.[6] In making its

---

[4] The Court notes that Defendants have never challenged Plaintiffs' standing. Moreover, at the summary judgment stage, both this Court and the Second Circuit implicitly concluded that Plaintiffs had standing to maintain this suit.

[5] Defendants conceded that, in light of the Second Circuit's October 21, 2001 decision, they were liable for violating the CWA.

[6] Several courts have stated that "[c]ivil penalties are mandatory once Clean Water Act violations are found, although the amount to be assessed is wholly within the discretion of the court." *Hawaii's Thousand Friends v. City & County of Honolulu*, 821 *F.*

determination, the Court must keep in mind that the purpose of the CWA's penalty provision is "deterrence with respect to both *the* violator's future conduct (specific deterrence) and the general population regulated by the Act (general deterrence)." *United States v. Mun. Auth. of Union Township,* 929 F. *Supp.* 800, 806 (M.D. Pa. 1996), *aff'd,* 150 F.3d 259 (3d Cir. 1998) (citation omitted). To attain the goal of deterrence, the penalty must have two components: (1) "it must encompass the economic benefit of noncompliance to ensure that the violator does not profit from its violation of the law" and (2) it "must include a punitive component in the form of a sum in addition to

---

Supp. *1368, 1394 (D.* Haw. 1993) (citing *Atlantic States Legal Foundation v. Tyson Foods, Inc., 897* F.2d 1128, 1142 (11th Cir. 1990); *Stoddard v. Western Carolina Regional Sewer Authority,* 784 F.2d 1200, 1208 (4th Cir. 1986)); *see also Piney Run Pres. Ass'n v. County Comm'rs of Carroll County, 82 F.* Supp. 2d 464, 470 (D. Md. *2000), vacated and remanded on other grounds,* 268 F.3d 255 (4th Cir. 2001) ("The 'highly discretionary calculations necessary to assess penalties [under the CWA] are particularly within the purview of trial judges' and, therefore, are granted wide deference." (quotation omitted)). In addition, some courts have held that the issues of intent and fault are not relevant to the issue of whether the court should impose penalties but are only relevant with respect to the issue of the amount of the penalty. *See, e.g., United States v. Ohio Edison Co., 725* F. Supp. *928, 934 (N.D.* Ohio *1989)* (citations omitted).

economic benefit which accounts for the degree of seriousness and/or willfulness of the violations." *Id.*

Section 1319 of the CWA sets forth six factors that a court must consider when determining the amount of civil penalties to impose against a defendant:

> [1] the seriousness of the violation or violations, [2] the economic benefit (if any) resulting from the violation, [3] any history of such violations, [4] any good-faith efforts to comply with the applicable requirements, [5] the economic impact of the penalty on the violator, and [6] such other matters as justice may require.

33 U.S.C. § 1319(d).

Moreover, when applying these factors to a particular situation, "courts generally employ either a 'top-down' or 'bottom-up' method."[7] *Piney Run Pres. Ass'n v. County Comm'rs of Carroll County,* 82 F. Supp. 2d 464, 470 (D. Md. 2000), *vacated and remanded on other grounds, 268*

[7] The Second Circuit has not determined whether the "top-down" or the "bottom-up" approach is the appropriate means of calculating civil penalties under the CWA.

F.3d 255 (4th Cir. 2001) (citation omitted); *compare Union Township,* 929 F. Supp. at 806 (finding that "top-down" approach is not appropriate and choosing, instead, to "begin with economic gain and add a sum to that figure guided by the other § 1319(d) factors and the need for punishment and deterrence"); *with Atlantic States Legal Found., Inc. v. Tyson Foods, Inc.,* 897 F.2d 1128, 1137 (11th Cir. 1990) (finding that "top-down" approach is the appropriate methodology for calculating CWA penalties).

If the "top-down" approach is used, the court will "first calculate the maximum penalty based on the $25,000 [$27,500 or $31,500] per day figure,[8] then adjust the figure down, as necessary, to account for the six factors listed in § 1319(d)." *Piney Run,* 82 F. Supp. 2d at 470 (citing *[Smithfield,* 191 F.3d] at 528 n.7); *see* 40 C.F.R. § 19.4. If, on the other hand, the court employs the "bottom up"

---

[8] The maximum penalty is $25,000 per day for violations occurring on or before January 30, 1997, *see* 33 U.S.C. § 1319(d), $27,500 per day for violations occurring between January 31, 1997 and August 19, 2002, and $31,500 per day for violations occurring thereafter, *see* 40 C.F.R. § 19.4.

method, the court will first "determine the economic benefit the defendant derived by violating the [CWA], and then adjust that figure upward or downward using the remaining five factors in § 1319(d)." *Piney Run*, 82 F. Supp. 2d at 470 (citing *[Smithfield*, 191 F.3d at 528]).

For the reasons addressed below in its discussion of the economic benefit factor, based upon the circumstances of this case, the Court concludes that the "top down" approach provides the appropriate manner in which to determine the amount of civil penalties that should be awarded against Defendants for their violations of the CWA.

a. Maximum amount of penalties

Although the parties stipulated that the Shandaken Tunnel discharged water into the Esopus Creek on 1,983 days between February 1, 1995 and December 31, 2001, and approximately 150 days in 2002, the Court reviewed Defendants' Exhibit "D-17" (Bates 15935-15942), plus the additional data for the year 2002, which the Court

requested, and determined that the Shandaken Tunnel was in operation for a total of 2,326 days during this period: 308 days (1995) + 185 days (1996) + 247 days (1997) + 275 days (1998) + 320 days (1999) + 280 days (2000) + 349 days (2001) + 362 days (2002).

Using these numbers, the Court then calculated the maximum civil penalties as follows:

Year	**Days**	**Maximum Penalty Per Day**	**Total**
1995	308	$25,000	$ 7,700,000
1996	185	$25,000	$ 4,625,000
1997	3	$25,000	$ 75,000
	244	$27,500	$ 6,710,000
1998	275	$27,500	$ 7,562,500
1999	320	$27,500	$ 8,800,000
2000	280	$27,500	$ 7,700,000
2001	349	$27,500	$ 9,597,500
2002	231	$27,500	$ 6,352,500
	131	$31,500	$ 4,126,500
		TOTAL:	**$63,249,00**

Using this figure as a starting point, the Court will address each of the six factors set forth in § 1319(d) in turn.

b. The seriousness of the violation or violations

To determine the seriousness of a defendant's violations, the court should consider "the frequency and severity of the violations as well as their effect on the environment." *Piney* ***Run,*** 82 F. Supp. 2d at 471 (citing *United States v. Smithfield Foods, Inc., 972 F. Supp. 338,* 343 (E.D. Va. 1997)). Although some courts have acknowledged that "a significant penalty maybe appropriate even absent proof of actual negative effect," *id.* (citing *([Smithfield,* 972 F. Supp.] at 344), other courts have found that the lack of material environmental harm is a significant mitigating factor even though the defendant has violated the CWA a significant number of times. *See Atlantic States Legal Found. Inc. v. Universal Tool & Stamping Co., Inc., 786* F. Supp. *743,* 747-49 (N.D. Ind. 1992) (finding that, even though the defendant had violated its CWA permit more than 1,900 times during the relevant period, the lack of material environmental harm was a significant mitigating factor).

As noted, Defendants operated the Shandaken Tunnel without a permit, and thus violated the CWA, on 2,326 days between February I, 1995 and December 31, 2002.[9] While this is a significant number of violations, the Court must also weigh the fact that the turbidity and suspended solids which Defendants discharged through the Shandaken Tunnel were not toxic and, at least in part, were the result of the natural conditions of the water that flowed through that Tunnel. Moreover, although there was some evidence at trial that the trout below the Shandaken Tunnel were smaller than the trout above the Shandaken Tunnel, there was no evidence of a significant decrease in the number of trout or of any trout kill as a result of the discharges. In fact, there was evidence that without the

[9] February 1, 1995 is the appropriate starting date for determining the amount of civil penalties to be awarded in this case because "in citizen enforcement actions the five-year statute of limitations period [set forth in 28 U.S.C. § 2462] is tolled sixty days before the filing of the complaint, to accommodate the statutorily-mandated sixty-day notice period." *Sierra Club v. Chevron U.S.A., Inc.*, 834 F.2d 1517, 1524 (9th Cir. 1987). Since Plaintiffs filed their complaint in this action on March 31, 2000, the five-year statute of limitations was tolled on February 1, 1995.

discharge of the water through the Shandaken Tunnel, there would have less habitat for trout because of low water levels. Based upon this evidence, the Court considers this element to be a mitigating factor.

c. The economic benefit resulting from the violations

The economic benefit that the violator enjoys as a result of violating the CWA is "[a] critical component of any penalty analysis under the [CWA] ...." *United States v. Allegheny Ludlum Corp.*, 187 F. Supp. 2d 426, 436 (W.D. Pa. 2002). "The goal of economic benefit analysis is to prevent a violator from profiting from its wrongdoing." *Id.* (citing *Dean Dairy, 150* F.3d at 263). Since it is difficult to prove precise economic benefit, "'reasonable approximations ... will *suffice.*" *Piney Run,* 82 F. Supp. 2d at 470 (quoting *Smithfield,* 191 F.3d at 529). In making this determination, "the court must endeavor to reach a "'rational estimate of [the violator's] economic benefit, *resolving uncertainties in favor of a higher estimate.*"'"

Union Township, 929 F. Supp. at 806 (quotation omitted). "The estimate 'must encompass *every* benefit that defendants received from violation of the law.' *Id.* (quotation omitted). "It would eviscerate the [CWA] to allow violators to escape civil penalties on the ground that such penalties cannot be calculated with precision." *Id.* at 806-07.

There are two elements to the calculation of economic benefit: "(1) the benefit that the [defendant] received from delayed capital spending (i.e., money saved by delay in issuing and making payments on general obligation bonds to finance the construction of the required pollution control equipment); and (2) the operating and maintenance ("O & M") expenses for the pollution control equipment that the [defendant] avoided operating during the period compliance was delayed." *Hawaii's Thousand Friends, 821* F. Supp. at 1387.

Plaintiffs did not submit any evidence with respect to the benefit that Defendants received by delaying capital

spending. Rather, they focused their proof with respect to economic benefit on the operating and maintenance expenses that Defendants would have incurred had they built a coagulation plant near the Shandaken Tunnel. Dr. Bell testified that, by not building a coagulation plant, Defendants saved $27,083,833 in operational and maintenance costs for the period of February 1, 1995 through December 31, 2001. Although Defendants offered the testimony of David Nickols to rebut Dr. Bell's figures and the feasibility of Dr. Bell's design and his estimates of operational and maintenance costs, they did not present any other figure for the Court's consideration. In fact, based upon Mr. Nickols' testimony, if the Court were to take some of Defendants' arguments into consideration, the potential "economic benefit" to Defendants of not building a coagulation plant would increase.

That being said, however, the Court has some problems with Dr. Bell's testimony as it relates to the economic benefit that Defendants received as a result of

their violation of the CWA. First, the Court questions the feasibility of Dr. Bell's plan, both from a design and construction standpoint as well as an operational and maintenance perspective since he did not take into account the environmental impact of his design or the on-going effects on the environment -- such as the increased traffic -- that the construction of such a plant would have. In addition, Dr. Bell did not take into consideration the time required to design and construct such a facility. Mr. Nickols, however, estimated that it would take several years.

Allowing for several years to construct a coagulation plant of the type Dr. Bell suggested, the Court then must determine the appropriate date from which to measure the economic benefit of not constructing such a facility. If the Court were to measure the operational and maintenance savings from February 1, 1995, as Dr. Bell did, this would require a finding that Defendants should have begun work on the design and construction of a

coagulation plant in approximately 1990.[10] If, on the other hand, the Court determines that Defendants should have begun work on the design and construction of a coagulation plant on February 1, 1995 (when the statute of limitations was tolled for purposes of this action), November 20, 1998 (the date on which Plaintiffs served Defendants with their Notice of Intent to Sue), or October 21, 2001 (when the Second Circuit issued its decision), the operational and maintenance costs that Plaintiffs avoided would be far less than the $27,083,833 that Dr. Bell estimated because Defendants would not have incurred such costs until several years after they began construction on the coagulation plant.[11]

---

[10] It would be unreasonable for the Court to measure Defendants' economic benefit from this date in light of the Court's finding, *see* discussion *infra* Part 11.B.2.d, that it was reasonable for Defendants to believe, prior to October 21, 2001, that they did not need a SPDES permit to operate the Shandaken Tunnel.

[11] Assuming that it would have taken Defendants five years to design and build a coagulation plant, the earliest date that such a plant would have come on line, using February 1, 1995, as a starting date, is approximately February 1, 2000. Applying the numbers in Dr. Bell's Table 5-1, *see* Plaintiffs' Exhibit "P-83," the approximate operational and maintenance costs that Defendants

Nonetheless, despite the Court's problems with Dr. Bell's opinion regarding the economic benefit that inured to Defendants by not building a coagulation plant, the Court finds that this element is not a mitigating factor.[12]

d. Any history of such violations

In determining the history of a defendant's violations, the court must consider "not only similar violations in the past, but also the duration and continuity of the [defendant's] present violations." *Piney Run, 82 F.* Supp. 2d at 471 (citing *Smithfield Foods, 972* F. Supp. *at*

---

avoided by not having the coagulation plant in operation for the years 2000 through 2002 is roughly **$13,684,759** ($4,198,979 (2000) + $4,551,718 (2001) + $4,934,062 (2002), assuming that the costs in *2002* increased by 8.4% over 2001. This is a very rough estimate because in Dr. Bell's table all costs are shown in 2001 dollars and the Court's 2002 costs are not.

[12] The Court notes that § 1319(d)'s economic benefit element, the purpose of which is, at least in part, to ensure that a violator does not gain an economic advantage over its competitors, is of limited assistance to a court's determination of the appropriate amount of civil penalties to assess against a municipality which does not compete to provide water to its citizens. Moreover, a court must balance the economic feasibility of any proposed solution against the need of the municipality's citizens for an adequate water supply.

349).

The evidence adduced at trial demonstrated that Defendants recognized the need to address, and have worked to formulate a plan to address, the turbidity problem in the Catskill system since 1993.[13] However, as Dr. Principe testified, Defendants did not believe that they needed a SPDES permit to operate the Shandaken Tunnel until October 21, 2001, when the Second Circuit concluded that such a permit was necessary.

The Court finds that Defendants' belief, prior to October 21, 2001, that they did not need a SPDES permit to operate the Shandaken Tunnel was reasonable. In this

---

[13] In 1993, a Filtration Avoidance Determination ("FAD") was issued, which addressed the turbidity problems in the Catskill system. *See* Defendants' Exhibit "D-12" - "Short- and Long-term Plans to Reduce Turbidity in Schoharie and Ashokan Reservoirs," dated June 1993; Defendants' Exhibit "D-14" - "Determination on Filtration of New York City's Catskill and Delaware Water Supplies, dated January 19, 1993; Defendants' Exhibit "D-23" - "Short- and Long-terra. Plans to Reduce Turbidity in Schoharie and Ashokan Reservoirs, 1993 4th Quarter Report," dated January 1994. In addition, the most recent FAD, dated November 2002, included long-term programs to reduce turbidity with time lines. *See* Defendants' Exhibit "D-61" - "New York City Filtration Avoidance Determination," USEPA - November 2002 - "Surface Water Treatment Rule Determiantion for New York City's Catskill/Delaware Water Supply System."

regard, the Court notes that, although the EPA and DEC closely monitored the quality of Defendants' water supply pursuant to other statutes and were aware that Defendants discharged water through the Shandaken Tunnel as part of their water system, Dr. Principe testified that neither the EPA nor DEC ever suggested to Defendants that they needed a SPDES permit to operate the Shandaken Tunnel.[14] For these reasons, the Court finds that this element is a mitigating factor.

e. Any good faith efforts to comply with the applicable requirements

Once Defendants were aware that they were required to have a SPDES permit to operate the Shandaken Tunnel (October 21, 2001), they began discussions with DEC to determine what information DEC would need before it could issue Defendants such a permit. Although Defendants and DEC met on only one or two occasions

[14] In fact, on numerous occasions, DEC required Defendants to release water through the Shandaken Tunnel. *See, e.g.* Defendants' Exhibits "D-6," "D-8."

during the year following the Second Circuit's decision, as Dr. Principe noted, at the time Defendants received the Second Circuit's decision, shortly after the terrorist attack on September 11, 2001, they were in the midst of addressing other serious issues, including the safety of New York City's water supply.[15] In addition, although somewhat belatedly, Defendants did file a SPDES permit application on December 31, 2002.[16]

Based upon the evidence presented at trial, the Court concludes that Defendants' failure to apply for a SPDES permit until fourteen months after the Second Circuit's decision does not evidence a lack of good faith. When viewed against the backdrop of the September 11, 2001 terrorist attack and Defendants' compelling need to

---

[15] The Court notes that it found Dr. Principe to be a very credible and forthright witness, who readily acknowledged the need to address the turbidity problem in the Catskill water supply system. Moreover, the Court found Dr. Principe's knowledge of Defendants' water supply system and the regulations that govern this system to be very helpful to its analysis.

[16] Dr. Principe acknowledged that at least part of the impetus for filing the permit at that time was the pending trial in this matter.

ensure, as their first priority, that New York City's water supply was safe, this delay -- although somewhat extended -- was not undue. Moreover, although Plaintiffs make much of the fact that everything that Defendants have done in the past with respect to the turbidity problem was done because of other statutes, and not in an attempt to comply with the CWA, the Court is not convinced that the particular impetus for Defendants' actions is as important as the fact that Defendants have made efforts to abate the turbidity problem and continue to do so. Accordingly, based upon Defendants' ongoing efforts to address the turbidity issue and the fact that Defendants reasonably believed that they did not need a SPDES permit to operate the Shandaken Tunnel prior to the Second Circuit's decision on October 21, 2001, the Court finds that this element is a significant mitigating factor.[17]

---

[17] The Court notes, however, its concern that Defendants provided the Court with very little evidence to explain why they apparently failed to take any affirmative steps to comply with the Second Circuit's October 21, 2001 decision in a more expeditious manner. Had they done so, the Court would have been inclined to find that this

f. The economic impact of the penalty on the violator

"The central purpose of CWA penalties is to deter the defendant, and others, from committing future violations." Piney *Run, 82* F. Supp. 2d at 472 (citation omitted). "A damage award that is limited to economic benefit, therefore, is no deterrent at all because the violator would be no worse off than if it had complied in the first place." *Id.* (citation omitted); *see also Hawaii's Thousand Friends,* 821 F. Supp. at 1396 (finding that the economic impact of the penalty was not a mitigating factor where the penalty would result in only "a slight increase in the monthly rates paid by users of the sewer system").

The only evidence at trial with regard to this element indicates that Defendants could absorb the maximum penalty without serious consequences to their financial well-being. At his deposition, William

---

element required an even greater mitigation of the maximum penalty allowable under § 1319(d).

Kusterbeck, Treasurer of the New York City Water Board, stated that the New York City Water Board maintains a $60,000,000 operations and maintenance reserve fund, equal to one month's operations and maintenance expenses, in part, to pay for unanticipated NYCDEP expenses incurred in water supply or distribution. *See* Transcript of Deposition of William Kusterbeck, dated September 18, 2002, at 28. Moreover, every million dollars in assessed penalties will result in only a one-time $.30 increase in the average water user's annual rate payment. Thus, the Court concludes that this element is not a mitigating factor.

g. Such other matters as justice may require

Assessing a monetary penalty in this case would be tantamount to saying that if you believe in good faith that your activities are not subject to a CWA permit and neither the EPA nor DEC has ever indicated that you needed such a permit, you can be penalized if a citizen suit is commenced against you and the court finds that you are wrong. *See United States v. Bay-Houston Towing Co., Inc.,*

197 F. Supp. 2d 788, 826 (E. D. Mich. 2002). Thus, the Court finds that this element is a mitigating factor.

h. Calculation of civil penalties

As noted, the Court has used the top-down approach to calculate the amount of civil penalties to be assessed against Defendants. Therefore, the Court began its calculation with the maximum civil penalties that could be awarded against Defendants for the period from February 1, 1995 through December 31, 2002, i.e., $63,249,000. Having analyzed the other § 1319 factors, the Court finds that the lack of material environmental harm, Defendants' reasonable belief, prior to October 21, 2001, that they did not need a SPDES permit to operate the Shandaken Tunnel, and Defendants' efforts to address the turbidity problems, both before and after October 21, 2001, are mitigating factors. The Court also finds that, at the time of the Second Circuit's decision, it was reasonable for Defendants to focus much, if not all, of their attention upon the need to protect the water supply from any future terrorist attacks.

Thus, their delay in submitting an application for a SPDES permit for at least several months was reasonable. Although the Court finds that the fourteen month delay was somewhat extended, the Court, nonetheless, concludes that an eight month delay, i.e., until June 2002, would not have been unreasonable. Therefore, the Court concludes that no civil penalties should be assessed against Defendants for any violations occurring prior to June 22, 2002. This conclusion requires that the Court subtract $57,500,500 from the maximum allowable penalty to arrive at the final figure of $5,749,000.

3. Injunctive relief

In citizen suit proceedings, district courts are statutorily authorized to enter injunctions. *See 33* U.S.C. § 1365(a). "The proof of irreparable injury and the inadequacy of legal remedies are prerequisites to the granting of injunctive relief in a CWA case." *Cmty. Ass'n for Restoration of Env't ("CARE") v. Henry Bosma Dairy,* No. CY-98-3011, 2001 WL 1704240, *16 (ED. Wash.

2001) (citation omitted). "The Court must also balance the competing claims of injury and the public interest." *Id.* (citation omitted); see also *Million Youth March, Inc. v. Safir*, 155 F.3d 124, 126 (2d Cir. 1998) (stating that "when a federal district court crafts an injunction to vindicate a plaintiffs protected rights, it cannot simply order whatever a City is physically capable of doing, without regard to considerations of public health, safety, convenience, and cost.").

"Injunctive relief cannot automatically be granted upon a finding of statutory violation." *Intl Union, United Auto., Aerospace & Agric. Implement Workers of Am., AFL-CIO v. Amerace Corp., Inc.*, 740 F. Supp. 1072, 1086 (D.N.J. 1990) (citing *Weinberger v. Romero-Barcelo, 456 U.S. 305,* 312, 102 S. Ct. 1798, 1803, 72 L. Ed. 2d **91** (1982)) (other citation omitted). Nor can "irreparable injury ... be presumed from the mere fact that the Clean Water Act has been violated." *Id.* In determining whether to grant an injunction, "a court must balance the competing claims of

injury and must consider the effect on each party of the granting or withholding of the requested relief." *Amoco Prod. Co. v. Vill. of Gambell,* 480 U.S. 531, 542 (1987). Moreover, although the court should give particular regard to the public interest, "'[t]he grant of jurisdiction to ensure compliance with a statute hardly suggests an absolute duty to do so under any and all circumstances, and a federal judge sitting as chancellor is not mechanically obligated to grant an injunction for every violation of law.'" *Id.* (quoting *[Weinberger v. Romero-Barcela,* 456 U.S.] at 313, 102 S. Ct., at 1803).

Based upon the circumstances of this case, the Court concludes that it would be an improper use of injunctive relief to enjoin Defendants from operating the Shandaken Tunnel until they obtain a SPDES permit.. This does not mean, however, that the Court is without power to fashion some form of injunctive relief which will take into account the injury of both sides of this dispute and, at the same time, to bring the discharges from the Shandaken

Tunnel "into 'prompt' compliance with the [CWA]." *United States v. Confederate Acres Sanitary Sewer & Drainage Sys., Inc.*, 767 F. Supp. 834, 837 (W.D. Ky. 1990) (citation omitted).

Fashioning effective injunction relief in this case, however, is complicated by the fact that, resolution of this problem, to some extent, rests with DEC, as it is the only agency with the authority to issue a SPDES permit. Thus, for the Court to order Defendants to obtain a SPDES permit within a certain time frame would be ineffective if DEC failed to cooperate. However, under the All Writs Act,[18] the Court's power "to effectuate the injunction may extend to 'persons who, though not parties to the original action or engaged in wrongdoing, are in a position to frustrate the implementation of a court order or the proper administration of justice.'" *Id.* (quoting *United States v.*

[18] The All Writs Act provides that "[t]he Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law." 28 U.S.C. § 1651(a).

New York Telephone Company, 434 U.S. 159, 174, 98 S. Ct. 364, 373, 54 L. Ed. 2d 376 (1977)) (citing *United States v. Wallace*, 218 F. Supp. 290 (N.D. Ala. 1963)).

The testimony at trial indicated that, on average, DEC acts on an application for a SPDES permit within eighteen months. Given this timetable, the Court instructs Defendants that they are to provide DEC with all of the information that DEC needs to issue Defendants a SPDES permit as soon as practicable after DEC requests any such information. Moreover, pursuant to its authority under the All Writs Act, the Court instructs DEC, who is now a third-party Defendant in this action, to complete the application process and issue a SPDES permit to Defendants within eighteen months of the date of this Order. If, for any reason, DEC believes that it will be unable to complete the process and issue a permit to Defendants within this time frame, DEC is to inform the Court and the parties to this action in writing as to the reason for any delay as soon as DEC realizes that there will be a delay. In addition, the

Court instructs Defendants to provide the Court and opposing counsel on the first day of each month, beginning March 1, 2003 and continuing until such time as they obtain a SPDES permit, a written status report as to the progress they have made towards obtaining a SPDES permit and any other measures Defendants have made toward reducing the turbidity of the water that is discharged through the Shandaken Tunnel. Finally, the Court instructs Defendants to notify the Court and opposing counsel in writing when they receive a SPDES permit and are to file a copy of this permit with the Court.

C. Costs and Fees

In addition to civil penalties and injunctive relief, the CWA provides that a court "may award costs of litigation (including reasonable attorney and expert witness fees) to any prevailing or substantially prevailing party, whenever the court determines such award is appropriate." 33 U.S.C. § 1365(d). *See Tyson Foods,* 897 F.2d at 1143 (finding that in a case in which "a citizens group has

succeeded on the merits, [the court could not] conceive of any grounds that would justify a denial of fees and costs."). A plaintiff who prevails in the liability phase of a CWA citizens suit is a prevailing party within the meaning of § 1365(d). *See CARE, 2001 WL* 1704240, at *17. Moreover, "[t]he award should be equal to full compensation comparable to that of a fee-paying client." *Hudson River Fishermen's Ass'n v. Arcuri, 862 F. Supp. 73, 78 (S.D.N.Y.* 1994) (citing *Missouri v. Jenkins,* 491 U.S. 274, 286, 109 S. Ct. 2463, 2470-71, 105 L. Ed. 2d 229 (1989)).

In their complaint, Plaintiffs seek attorneys' fees and costs. Since Plaintiffs prevailed in the liability phase of this action, the Court concludes that they are prevailing parties within the meaning of § 1365(d). As such, they are entitled to an award of reasonable attorneys' fees and costs. Therefore, the Court instructs Plaintiffs to file and serve an application for such an award within ten days of the date of this Order. In calculating the attorneys' fees portion of their application, the Court instructs Plaintiffs that their

application must comply with the following rules. First, Plaintiffs must submit contemporaneous time records. Failure to do so will result in the Court substantially reducing the amount of attorneys' fees requested. *See New York v. RAC Holding, Inc.*, 135 F. Supp. 2d 359, 363-65 (N.D.N.Y. 2001). Second, Plaintiffs shall calculate the amount of the fees they are requesting as follows: (1) the hourly rate for work attributable to a law intern is $65.00; (2) the hourly rate for work attributable to Mr. Coplan or any other admitted attorney is $125.00, unless that attorney can demonstrate that he has practiced in the area of environmental law for more than ten years, in which case the appropriate hourly rate is $175.00. *See IBEW Local No. 910 Welfare, Annuity & Pension Funds v. Dexelectrics, Inc., 98* F. Supp. 2d 265, 275 (N.D.N.Y. 2000).

Once Plaintiffs have filed and served their application for attorneys' fees and costs; Defendants must file and serve any objections they have to the application no later than fourteen days after service of the application

upon them. Once the Court has received the parties' submissions, it will take the application under advisement and will issue an Order amending the Judgment accordingly.

IV. CONCLUSION

Based upon the evidence adduced at trial and the applicable law and for the reasons stated herein, the Court hereby

ORDERS that Defendants are liable for civil penalties in the amount of $5,749,000 pursuant to § 1319(d); and the Court further

ORDERS that Defendants are to pay these civil penalties to the United States Treasury pursuant to § 1365(a); and the Court further

ORDERS the following injunctive relief pursuant to § 1365(a) and the All Writs Act: (1) Defendants are to provide DEC with all of the information that DEC needs to issue Defendants a SPDES permit as soon as practicable after DEC requests any such information, (2) DEC is to

complete the application process and issue a SPDES permit to Defendants within eighteen months of the date of this Order, (3) if, for any reason, DEC believes that it will be unable to complete the process and issue a SPDES permit to Defendants within this time frame, DEC is to inform the Court and the parties to this action in writing as to the reason for any delay as soon as DEC realizes that there will be a delay, (4) Defendants are to provide the Court and opposing counsel, on the first day of each month, beginning March 1, 2003 and continuing until such time as they obtain a SPDES permit, with a written status report as to the progress they have made towards obtaining a SPDES permit and any other measures Defendants have made toward reducing the turbidity of the water being discharged through the Shandaken Tunnel, and (5) Defendants are to notify the Court and opposing counsel in writing when they receive a SPDES permit and are to file a copy of this permit with the Court; and the Court further

ORDERS that Plaintiffs are to file and serve their application for attorneys' fees and costs to the Court within ten days of the date of this Order pursuant to § 1365(d); and the Court further

ORDERS that Defendants are to file and serve any objections they have to Plaintiffs' application for attorneys' fees and costs no later than fourteen days after service of the application upon them; and the Court further

ORDERS that the Clerk of the Court is to enter judgment in favor of Plaintiffs and to close this case.

IT IS SO ORDERED.

Dated: February 6, 2003
Syracuse, New York

s/_____
Frederick J. Scullin, Jr.
Chief United States District Judge

ORDER AND AMENDED JUDGMENT OF THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF NEW YORK, DATED OCTOBER 23, 2003

REPRODUCED FOLLOWING

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

---------- x

CATSKILL MOUNTAINS CHAPTER OF TROUT UNLIMITED, INC., THEODORE GORDON FLYFISHERS, INC., CATSKILL-DELAWARE NATURAL WATER ALLIANCE, INC., FEDERATED SPORTSMEN'S CLUBS OF ULSTER COUNTY, INC., and RIVERKEEPER, INC.,

Plaintiff(s),

1:00-CV-511 (FJS/RFT)

-against-

THE CITY OF NEW YORK, NEW YORK CITY DEPARTMENT OF ENVIRONMENTAL PROTECTION, and JOEL A. MIELE, SR., COMMISSIONER OF DEPARTMENT OF ENVIRONMENTAL PROTECTION,

Defendant(s).

---------- x

APPEARANCES
PACE ENVIRONMENTAL LITIGATION CLINIC, INC.
78 North Broadway
White Plains, New York 10603
Attorneys for Plaintiffs

OF COUNSEL
KARL S. COPLAN, ESQ.
DANIEL E. ESTRIN, ESQ.

CITY OF NEW YORK OFFICE OF CORPORATION COUNSEL 100 Church Street New York, New York 10007-2601 Attorneys for Defendants City of New York and New York City Department of Environmental Protection	**HILARY M. MELTZER, ESQ.** **WILLIAM S. PLACHE, ESQ.**
OFFICE OF THE NEW YORK STATE ATTORNEY GENERAL New York State Department of Law -- Environmental Protection Bureau The Capitol Albany, New York 12204 Attorneys for Defendants Joel A. Miele, Sr., State of New York, New York State Department of Environmental Conservation and Erin M. Crotty	**JAMES M. TIERNEY, AAG**

SCULLIN, Senior Judge

ORDER

In a Decision dated June 13, 2006, the Second Circuit Court of Appeals affirmed this Court's judgment "except as to the amount of the civil penalty imposed on the City of New York and remand[ed] the case . . . to recalculate that penalty." *See Catskill Mountains Chapter of Trout Unlimited, Inc. v. City of N.Y., Dkt.* Nos. 03-7203, 03-7253, slip op. at 26.[1] Specifically, the Second Circuit noted that this Court had erroneously stated that "the maximum statutory penalty for the final 131 days of 2002 was $31,500 per day [when,] [i]n fact, the maximum daily penalty remained $27,500 until March of 2004. 40 C.F.R. § 19.4. Thus the maximum possible penalty was $62,725,000, not $63,249,000" as this Court stated. *See id.* Finally, because the Second Circuit had "no way to determine how [this Court's] calculation of the penalty would have differed, if at all, had it accurately determined

[1] The Court notes that it did not receive a copy of the Second Circuit's mandate until September 14, 2006. *See* Dkt. No. 197.

the maximum statutory penalty, [it] remand[ed] the case for recalculation of the penalty in light of the true statutory maximum." *See id.*

In the Memorandum-Decision and Order, upon which the judgment was based, this Court determined that "the Shandaken Tunnel was in operation for a total of 2,326 days during [the period from February 1, 1995 and December 31, 2002]" and "calculated the maximum civil penalt[y]" to be $63,249,000. *See* Memorandum-Decision and Order, dated February 6, 2003, at 10. This Court then adjusted that figure after considering the six factors set forth in 33 U.S.C. § 1319 and concluded that "no civil penalties should be assessed against Defendants for any violations occurring prior to June 22, 2002[,] thus requir[ing] that the Court subtract $57,500,5002[2] from the maximum allowable penalty to arrive at the final figure of $5,749,000." *See id.* at 19.

---

[2] The Court notes that it actually subtracted **$57,000,000** ***not*** $57,500,500 from the maximum statutory penalty of $63,249,000 to arrive at the final figure of $5,749,000.

Upon remand, the Court has reviewed its adjustments in light of the correct maximum statutory penalty of $62,725,000, and concludes that there is no reason to alter its decision not to assess civil penalties against Defendants for any violations prior to June 22, 2002. Thus, the Court subtracts $57,500,000 from the maximum allowable penalty of $62,725,000 to arrive at the final figure of **$5,225,000**.[3]

Accordingly, the Court hereby

ORDERS that the Clerk of the Court amend the judgment in this case to reflect that Defendants are liable for civil penalties in the amount of **$5,225,000** pursuant to

---

[3] The Court calculated the total civil penalty of $5, 225,000 as follows:

June 22-30, 2002	9 days
July 2002	31 days
August 2002	31 days
September 2002	30 days
October 2002	28 days
November 2002	30 days
December 2002	31 days
Total	190 days * $27,500 per day = $5,225,000

33 U.S.C. § 1319(d). The judgment remains the same in all other respects.

IT IS SO ORDERED.

Dated: October 23, 2006
Syracuse, New York

s/_____
Frederick J. Scullin, Jr.
Senior United States District Court Judge

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF NEW YORK

CATSKILL MOUNTAINS CHAPTER OF TROUT UNLIMITED, INC., ET AL

vs.

THE CITY OF NEW YORK, ET AL

****AMENDED ****
JUDGMENT IN A CIVIL CASE

CASE NO.
1:00-CV-511

____ **JURY VERDICT.** This action came before this Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

__XX__ **DECISION BY COURT.** This action came to trial of hearing before the Court. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED that Defendants are liable for civil penalties in the amount of **$5,225,000.00,** pursuant to 33 USC § 1319(d).

In accordance with Judge Scullin's Order filed on October 23, 2006.

Dated: October 23, 2006

Clerk of Court

s/ A. Topa
By: Deputy Clerk

ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT, FILED AUGUST 25, 2006

REPRODUCED FOLLOWING

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT
THURGOOD MARSHALL U.S. COURT HOUSE
40 FOLEY SQUARE
NEW YORK 10007

Roseann B. MacKechnie
CLERK

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT, FILED AUGUST 25, 2006
ROSEANN B. MACKECHNIE, CLERK

Date:

Docket Number:	03-7203-cv
Short Title:	Catskill Mountains v. City of New York
DC Docket Number:	00-cv-511
DC:	NDNY (ALBANY)
DC Judge:	Honorable Frederick Scull

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, Foley Square, in the City of New York, on the 25th day of August two thousand six.

CATSKILL MOUNTAINS CHAPTER OF TROUT UNLIMITED, INC., THEODORE GORDON FYLFISHERS, INC., CATSKILL-DELAWARE NATURAL WATER ALLIANCE, INC., FEDERATED SPORTSMEN'S CLUBS OF ULSTER COUNTY, INC. and RIVERKEEPER, INC.,

Plaintiffs-Appellees-Cross-Appellants

v.

CITY OF NEW YORK and NEW YORK CITY DEPARTMENT OF ENVIRONMENTAL PROTECTION,

Defendants-Third-Party-Plaintiffs-Appelants-Cross-Appellees.

JOEL A. MIELE, SR., Commissioner of Department of Environmental Protection,

Defendant-Appellant-Cross-Appellee,

STATE OF NEW YORK, NEW YORK STATE DEPARTMENT OF ENVIRONMENTAL CONSERVATION and ERIN M. CROTTY, Commissioner of the New York State Department of Environmental Conservation,

Third-Party-Defendants-Appellees.

A petition for panel rehearing and a petition for rehearing en banc having been filed herein by the appellants City of New York, et al. Upon consideration by the panel that decided the appeal, it is Ordered that said petition for rehearing is **DENIED**.

It is further noted that the petition for rehearing en banc has been transmitted to the judges for the court in regular active service and to any other judge that heard the appeal and that no such judge has requested that a vote be taken thereon.

For the Court,
Roseann B. MacKechnie, Clerk

By: s/_____
Motion Staff Attorney

RELEVANT PROVISIONS OF FEDERAL WATER POLLUTION CONTROL ACT

REPRODUCED FOLLOWING

Federal Water Pollution Control Act, 33 U.S.C. §§ 1251 *et seq.* (the "Clean Water Act")

Relevant Provisions

§ 1251. Congressional declaration of goals and policy

(a) Restoration and maintenance of chemical, physical and biological integrity of Nation's waters; national goals for achievement of objective. The objective of this Act is to restore and maintain the chemical, physical, and biological integrity of the Nation's waters. In order to achieve this objective it is hereby declared that, consistent with the provisions of this Act –

(1) it is the national goal that the discharge of pollutants into the navigable waters be eliminated by 1985;

(2) it is the national goal that wherever attainable, an interim goal of water quality which provides for the protection and propagation of fish, shellfish, and wildlife and provides for recreation in and on the water be achieved by July 1, 1983;

(3) it is the national policy that the discharge of toxic pollutants in toxic amounts be prohibited;

(4) it is the national policy that Federal financial assistance be provided to construct publicly owned waste treatment works;

(5) it is the national policy that areawide waste treatment management planning processes be developed and implemented to assure adequate control of sources of pollutants in each State;

(6) it is the national policy that a major research and demonstration effort be made to develop technology necessary to eliminate the discharge of pollutants into the navigable waters, waters of the contiguous zone, and the oceans; and

(7) it is the national policy that programs for the control of nonpoint sources of pollution be developed and

implemented in an expeditious manner so as to enable the goals of this Act to be met through the control of both point and nonpoint sources of pollution.

(b) Congressional recognition, preservation, and protection of primary responsibilities and rights of States. It is the policy of the Congress to recognize, preserve, and protect the primary responsibilities and rights of States to prevent, reduce, and eliminate pollution, to plan the development and use (including restoration, preservation, and enhancement) of land and water resources, and to consult with the Administrator in the exercise of his authority under this Act. It is the policy of Congress that the States manage the construction grant program under this Act and implement the permit programs under sections 402 and 404 of this Act. It is further the policy of the Congress to support and aid research relating to the prevention, reduction, and elimination of pollution, and to provide Federal technical services and financial aid to State and interstate agencies and municipalities in connection with the prevention, reduction, and elimination of pollution.

(c) Congressional policy toward Presidential activities with foreign countries. It is further the policy of Congress that the President, acting through the Secretary of State and such national and international organizations as he determines appropriate, shall take such action as may be necessary to insure that to the fullest extent possible all foreign countries shall take meaningful action for the prevention, reduction, and elimination of pollution in their waters and in international waters and for the achievement of goals regarding the elimination of discharge of pollutants and the improvement of water quality to at least the same extent as the United States does under its laws.

(d) Administrator of Environmental Protection Agency to administer 33 USCS §§ 1251 et seq. Except as otherwise

expressly provided in this Act, the Administrator of the Environmental Protection Agency (hereinafter in this Act called "Administrator") shall administer this Act.

(e) Public participation in development, revision, and enforcement of any regulation, etc. Public participation in the development, revision, and enforcement of any regulation, standard, effluent limitation, plan, or program established by the Administrator or any State under this Act shall be provided for, encouraged, and assisted by the Administrator and the States. The Administrator, in cooperation with the States, shall develop and publish regulations specifying minimum guidelines for public participation in such processes.

(f) Procedures utilized for implementing 33 USCS §§ 1251 et seq. It is the national policy that to the maximum extent possible the procedures utilized for implementing this Act shall encourage the drastic minimization of paperwork and interagency decision procedures, and the best use of available manpower and funds, so as to prevent needless duplication and unnecessary delays at all levels of government.

(g) Authority of States over water. It is the policy of Congress that the authority of each State to allocate quantities of water within its jurisdiction shall not be superseded, abrogated or otherwise impaired by this Act. It is the further policy of Congress that nothing in this Act shall be construed to supersede or abrogate rights to quantities of water which have been established by any State. Federal agencies shall co-operate with State and local agencies to develop comprehensive solutions to prevent, reduce and eliminate pollution in concert with programs for managing water resources.

§ 1311. Effluent limitations

(a) Illegality of pollutant discharges except in compliance with law. Except as in compliance with this section and sections 302, 306, 307, 318, 402, and 404 of this Act, the discharge of any pollutant by any person shall be unlawful.

(b) Timetable for achievement of objectives. In order to carry out the objective of this Act there shall be achieved--

(1) (A) not later than July 1, 1977, effluent limitations for point sources, other than publicly owned treatment works, (i) which shall require the application of the best practicable control technology currently available as defined by the Administrator pursuant to section 304(b) of this Act, or (ii) in the case of a discharge into a publicly owned treatment works which meets the requirements of subparagraph (B) of this paragraph, which shall require compliance with any applicable pretreatment requirements and any requirements under section 307 of this Act; and

(B) for publicly owned treatment works in existence on July 1, 1977, or approved pursuant to section 203 of this Act prior to June 30, 1974 (for which construction must be completed within four years of approval), effluent limitations based upon secondary treatment as defined by the Administrator pursuant to section 304(d)(1) of this Act; or,

(C) not later than July 1, 1977, any more stringent limitation, including those necessary to meet water quality standards, treatment standards, or schedules of compliance, established pursuant to any State law or regulations (under authority preserved by section 510) or any other Federal law or regulation, or required to implement any applicable water quality standard established pursuant to this Act.

(2) (A) for pollutants identified in subparagraphs (C), (D), and (F) of this paragraph, effluent limitations for categories and classes of point sources, other than publicly

owned treatment works, which (i) shall require application of the best available technology economically achievable for such category or class, which will result in reasonable further progress toward the national goal of eliminating the discharge of all pollutants, as determined in accordance with regulations issued by the Administrator pursuant to section 304(b)(2) of this Act, which such effluent limitations shall require the elimination of discharges of all pollutants if the Administrator finds, on the basis of information available to him (including information developed pursuant to section 315), that such elimination is technologically and economically achievable for a category or class of point sources as determined in accordance with regulations issued by the Administrator pursuant to section 304(b)(2) of this Act, or (ii) in the case of the introduction of a pollutant into a publicly owned treatment works which meets the requirements of subparagraph (B) of this paragraph, shall require compliance with any applicable pretreatment requirements and any other requirement under section 307 of this Act;

(B) [Repealed]

(C) with respect to all toxic pollutants referred to in table 1 of Committee Print Numbered 95-30 of the Committee on Public Works and Transportation of the House of Representatives compliance with effluent limitations in accordance with subparagraph (A) of this paragraph as expeditiously as practicable but in no case later than three years after the date such limitations are promulgated under section 304(b), and in no case later than March 31, 1989;

(D) for all toxic pollutants listed under paragraph (1) of subsection (a) of section 307 of this Act which are not referred to in subparagraph (C) of this paragraph compliance with effluent limitations in accordance with subparagraph (A) of this paragraph as expeditiously as practicable, but in no case later than three

years after the date such limitations are promulgated under section 304(b), and in no case later than March 31, 1989;

(E) as expeditiously as practicable but in no case later than three years after the date such limitations are promulgated under section 304(b), and in no case later than March 31, 1989, compliance with effluent limitations for categories and classes of point sources, other than publicly owned treatment works, which in the case of pollutants identified pursuant to section 304(a)(4) of this Act shall require application of the best conventional pollutant control technology as determined in accordance with regulations issued by the Administrator pursuant to section 304(b)(4) of this Act; and

(F) for all pollutants (other than those subject to subparagraphs (C), (D), or (E) of this paragraph) compliance with effluent limitations in accordance with subparagraph (A) of this paragraph as expeditiously as practicable but in no case later than 3 years after the date such limitations are established, and in no case later than March 31, 1989.

(3) (A) for effluent limitations under paragraph (1)(A)(i) of this subsection promulgated after January 1, 1982, and requiring a level of control substantially greater or based on fundamentally different control technology than under permits for an industrial category issued before such date, compliance as expeditiously as practicable but in no case later than three years after the date such limitations are promulgated under section 304(b), and in no case later than March 31, 1989; and

(B) for any effluent limitation in accordance with paragraph (1)(A)(i), (2)(A)(i), or (2)(E) of this subsection established only on the basis of section 402(a)(1) in a permit issued after enactment of the Water Quality Act of 1987 [enacted Feb. 4, 1987], compliance as expeditiously as practicable but in no case later than three years after the date such limitations are established, and in no case later than March 31, 1989.

(c) Review; revised standards; publication.

(1) The Governor of a State or the State water pollution control agency of such State shall from time to time (but at least once each three year period beginning with the date of enactment of the Federal Water Pollution Control Act Amendments of 1972 [enacted Oct. 18, 1972]) hold public hearings for the purpose of reviewing applicable water quality standards and, as appropriate, modifying and adopting standards. Results of such review shall be made available to the Administrator.

(2) (A) Whenever the State revises or adopts a new standard, such revised or new standard shall be submitted to the Administrator. Such revised or new water quality standard shall consist of the designated uses of the navigable waters involved and the water quality criteria for such waters based upon such uses. Such standards shall be such as to protect the public health or welfare, enhance the quality of water and serve the purposes of this Act. Such standards shall be established taking into consideration their use and value for public water supplies, propagation of fish and wildlife, recreational purposes, and agricultural, industrial, and other purposes, and also taking into consideration their use and value for navigation.

(B) Whenever a State reviews water quality standards pursuant to paragraph (1) of this subsection, or revises or adopts new standards pursuant to this paragraph, such State shall adopt criteria for all toxic pollutants listed pursuant to section 307(a)(1) of this Act for which criteria have been published under section 304(a), the discharge or presence of which in the affected waters could reasonably be expected to interfere with those designated uses adopted by the State, as necessary to support such designated uses. Such criteria shall be specific numerical criteria for such

toxic pollutants. Where such numerical criteria are not available, whenever a State reviews water quality standards pursuant to paragraph (1), or revises or adopts new standards pursuant to this paragraph, such State shall adopt criteria based on biological monitoring or assessment methods consistent with information published pursuant to section 304(a)(8). Nothing in this section shall be construed to limit or delay the use of effluent limitations or other permit conditions based on or involving biological monitoring or assessment methods or previously adopted numerical criteria.

(3) If the Administrator, within sixty days after the date of submission of the revised or new standard, determines that such standard meets the requirements of this Act, such standard shall thereafter be the water quality standard for the applicable waters of that State. If the Administrator determines that any such revised or new standard is not consistent with the applicable requirements of this Act, he shall not later than the ninetieth day after the date of submission of such standard notify the State and specify the changes to meet such requirements. If such changes are not adopted by the State within ninety days after the date of notification, the Administrator shall promulgate such standard pursuant to paragraph (4) of this subsection.

(4) The Administrator shall promptly prepare and publish proposed regulations setting forth a revised or new water quality standard for the navigable waters involved--

(A) if a revised or new water quality standard submitted by such State under paragraph (3) of this subsection for such waters is determined by the Administrator not to be consistent with the applicable requirements of this Act, or

(B) in any case where the Administrator determines that a revised or new standard is necessary to meet the requirements of this Act.

The Administrator shall promulgate any revised or new standard under this paragraph not later than ninety days after he publishes such proposed standards, unless prior to such promulgation, such State has adopted a revised or new water quality standard which the Administrator determines to be in accordance with this Act.

(d) Identification of areas with insufficient controls; maximum daily load; certain effluvient limitations revision.

(1) (A) Each State shall identify those waters within its boundaries for which the effluent limitations required by section 301(b)(1)(A) and section 301(b)(1)(B) are not stringent enough to implement any water quality standard applicable to such waters. The State shall establish a priority ranking for such waters, taking into account the severity of the pollution and the uses to be made of such waters.

(B) Each State shall identify those waters or parts thereof within its boundaries for which controls on thermal discharges under section 301 are not stringent enough to assure protection and propagation of a balanced indigenous population of shellfish, fish, and wildlife.

(C) Each State shall establish for the waters identified in paragraph (1)(A) of this subsection, and in accordance with the priority ranking, the total maximum daily load, for those pollutants which the Administrator identifies under section 304(a)(2) as suitable for such calculation. Such load shall be established at a level necessary to implement the applicable water quality standards with seasonal variations and a margin of safety which takes into account any lack of knowledge concerning the relationship between effluent limitations and water quality.

(D) Each State shall estimate for the waters identified in paragraph (1)(B) of this subsection the total maximum daily thermal load required to assure protection and propagation of a balanced, indigenous population of

shellfish, fish and wildlife. Such estimates shall take into account the normal water temperatures, flow rates, seasonal variations, existing sources of heat input, and the dissipative capacity of the identified waters or parts thereof. Such estimates shall include a calculation of the maximum heat input that can be made into each such part and shall include a margin of safety which takes into account any lack of knowledge concerning the development of thermal water quality criteria for such protection and propagation in the identified waters or parts thereof.

§ 1314. Information and guidelines

(f) Identification and evaluation of nonpoint sources of pollution; processes, procedures, and methods to control pollution. The Administrator, after consultation with appropriate Federal and State agencies and other interested persons, shall issue to appropriate Federal agencies, the States, water pollution control agencies, and agencies designated under section 208 of this Act, within one year after the effective date of this subsection [effective Oct. 18, 1972] (and from time to time thereafter) information including (1) guidelines for identifying and evaluating the nature and extent of nonpoint sources of pollutants, and (2) processes, procedures, and methods to control pollution resulting from--

(A) agricultural and silvicultural activities, including runoff from fields and crop and forest lands;

(B) mining activities, including runoff and siltation from new, currently operating, and abandoned surface and underground mines;

(C) all construction activity, including runoff from the facilities resulting from such construction;

(D) the disposal of pollutants in wells or in subsurface excavations;

(E) salt water intrusion resulting from reductions of fresh water flow from any cause, including extraction of ground water, irrigation, obstruction, and diversion; and

(F) changes in the movement, flow, or circulation of any navigable waters or ground waters, including changes caused by the construction of dams, levees, channels, causeways, or flow diversion facilities.

Such information and revisions thereof shall be published in the Federal Register and otherwise made available to the public.

(b) Civil actions. The Administrator is authorized to commence a civil action for appropriate relief, including a permanent or temporary injunction, for any violation for which he is authorized to issue a compliance order under subsection (a) of this section. Any action under this subsection may be brought in the district court of the United States for the district in which the defendant is located or resides or is doing business, and such court shall have jurisdiction to restrain such violation and to require compliance. Notice of the commencement of such action shall be given immediately to the appropriate State.

(c) Criminal penalties.

(1) Negligent violations. Any person who--

(A) negligently violates section 301, 302, 306, 307, 308, 311(b)(3), 318, or 405 of this Act, or any permit condition or limitation implementing any of such sections in a permit issued under section 402 of this Act by the Administrator or by a State, or any requirement imposed in a pretreatment program approved under section 402(a)(3) or 402(b)(8) of this Act or in a permit issued under section 404 of this Act by the Secretary of the Army or by a State; or

(B) negligently introduces into a sewer system or into a publicly owned treatment works any pollutant or hazardous substance which such person knew or reasonably should have known could cause personal injury or property damage or, other than in compliance with all applicable Federal, State, or local requirements or permits, which causes such treatment works to violate any effluent limitation or condition in any permit issued to the treatment works under section 402 of this Act by the Administrator or a State;

shall be punished by a fine of not less than $ 2,500 nor more than $ 25,000 per day of violation, or by

imprisonment for not more than 1 year, or by both. If a conviction of a person is for a violation committed after a first conviction of such person under this paragraph, punishment shall be by a fine of not more than $ 50,000 per day of violation, or by imprisonment of not more than 2 years, or by both.

(2) Knowing violations. Any person who--

(A) knowingly violates section 301, 302, 306, 307, 308, 311(b)(3), 318, or 405 of this Act, or any permit condition or limitation implementing any of such sections in a permit issued under section 402 of this Act by the Administrator or by a State, or any requirement imposed in a pretreatment program approved under section 402(a)(3) or 402(b)(8) of this Act or in a permit issued under section 404 of this Act by the Secretary of the Army or by a State; or

(B) knowingly introduces into a sewer system or into a publicly owned treatment works any pollutant or hazardous substance which such person knew or reasonably should have known could cause personal injury or property damage or, other than in compliance with all applicable Federal, State, or local requirements or permits, which causes such treatment works to violate any effluent limitation or condition in a permit issued to the treatment works under section 402 of this Act by the Administrator or a State;

shall be punished by a fine of not less than $ 5,000 nor more than $ 50,000 per day of violation, or by imprisonment for not more than 3 years, or by both. If a conviction of a person is for a violation committed after a first conviction of such person under this paragraph, punishment shall be by a fine of not more than $ 100,000 per day of violation, or by imprisonment of not more than 6 years, or by both.

(3) Knowing endangerment.

(A) General rule. Any person who knowingly violates section 301, 302, 303, 306, 307, 308, 311(b)(3),

318, or 405 of this Act, or any permit condition or limitation implementing any of such sections in a permit issued under section 402 of this Act by the Administrator or by a State, or in a permit issued under section 404 of this Act by the Secretary of the Army or by a State, and who knows at that time that he thereby places another person in imminent danger of death or serious bodily injury, shall, upon conviction, be subject to a fine of not more than $ 250,000 or imprisonment of not more than 15 years, or both. A person which is an organization shall, upon conviction of violating this subparagraph, be subject to a fine of not more than $ 1,000,000. If a conviction of a person is for a violation committed after a first conviction of such person under this paragraph, the maximum punishment shall be doubled with respect to both fine and imprisonment.

(B) Additional provisions. For the purpose of subparagraph (A) of this paragraph--

(i) in determining whether a defendant who is an individual knew that his conduct placed another person in imminent danger of death or serious bodily injury--

(I) the person is responsible only for actual awareness or actual belief that he possessed; and

(II) knowledge possessed by a person other than the defendant but not by the defendant himself may not be attributed to the defendant;

except that in proving the defendant's possession of actual knowledge, circumstantial evidence may be used, including evidence that the defendant took affirmative steps to shield himself from relevant information;

(ii) it is an affirmative defense to prosecution that the conduct charged was consented to by the person endangered and that the danger and conduct charged were reasonably foreseeable hazards of--

(I) an occupation, a business, or a profession; or

(II) medical treatment or medical or scientific experimentation conducted by professionally approved methods and such other person had been made aware of the risks involved prior to giving consent;

and such defense may be established under this subparagraph by a preponderance of the evidence;

(iii) the term "organization" means a legal entity, other than a government, established or organized for any purpose, and such term includes a corporation, company, association, firm, partnership, joint stock company, foundation, institution, trust, society, union, or any other association of persons; and

(iv) the term "serious bodily injury" means bodily injury which involves a substantial risk of death, unconsciousness, extreme physical pain, protracted and obvious disfigurement, or protracted loss or impairment of the function of a bodily member, organ, or mental faculty.

(4) False statements. Any person who knowingly makes any false material statement, representation, or certification in any application, record, report, plan, or other document filed or required to be maintained under this Act or who knowingly falsifies, tampers with, or renders inaccurate any monitoring device or method required to be maintained under this Act, shall upon conviction, be punished by a fine of not more than $ 10,000, or by imprisonment for not more than 2 years, or by both. If a conviction of a person is for a violation committed after a first conviction of such person under this paragraph, punishment shall be by a fine of not more than $ 20,000 per day of violation, or by imprisonment of not more than 4 years, or by both.

(5) Treatment of single operational upset. For purposes of this subsection, a single operational upset

which leads to simultaneous violations of more than one pollutant parameter shall be treated as a single violation.

(6) Responsible corporate officer as "person". For the purpose of this subsection, the term "person" means, in addition to the definition contained in section 502(5) of this Act, any responsible corporate officer.

(7) Hazardous substance defined. For the purpose of this subsection, the term "hazardous substance" means (A) any substance designated pursuant to section 311(b)(2)(A) of this Act, (B) any element, compound, mixture, solution, or substance designated pursuant to section 102 of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980, (C) any hazardous waste having the characteristics identified under or listed pursuant to section 3001 of the Solid Waste Disposal Act (but not including any waste the regulation of which under the Solid Waste Disposal Act has been suspended by Act of Congress), (D) any toxic pollutant listed under section 307(a) of this Act, and (E) any imminently hazardous chemical substance or mixture with respect to which the Administrator has taken action pursuant to section 7 of the Toxic Substances Control Act.

(d) Civil penalties; factors considered in determining amount. Any person who violates section 301, 302, 306, 307, 308, 318, or 405 of this Act, or any permit condition or limitation implementing any of such sections in a permit issued under section 402 of this Act by the Administrator, or by a State, or in a permit issued under section 404 of this Act by a State[,], or any requirement imposed in a pretreatment program approved under section 402(a)(3) or 402(b)(8) of this Act, and any person who violates any order issued by the Administrator under subsection (a) of this section, shall be subject to a civil penalty not to exceed $ 25,000 per day for each violation. In determining the amount of a civil penalty the court shall consider the seriousness of the violation or violations, the economic

benefit (if any) resulting from the violation, any history of such violations, any good-faith efforts to comply with the applic[illegible] requirements, the economic impact of the penalty on the violator, and such other matters as justice may require. For purposes of this subsection, a single operational upset which leads to simultaneous violations of more than one pollutant parameter shall be treated as a single violation.

§ 1342. National pollutant discharge elimination system

(a) Permits for discharge of pollutants.

(1) Except as provided in sections 318 and 404 of this Act, the Administrator may, after opportunity for public hearing, issue a permit for the discharge of any pollutant, or combination of pollutants, notwithstanding section 301(a), upon condition that such discharge will meet either (A) all applicable requirements under sections 301, 302, 306, 307, 308, and 403 of this Act, (B) or prior to the taking of necessary implementing actions relating to all such requirements, such conditions as the Administrator determines are necessary to carry out the provisions of this Act.

(2) The Administrator shall prescribe conditions for such permits to assure compliance with the requirements of paragraph (1) of this subsection, including conditions on data and information collection, reporting, and such other requirements as he deems appropriate.

(3) The permit program of the Administrator under paragraph (1) of this subsection, and permits issued thereunder, shall be subject to the same terms, conditions, and requirements as apply to a State permit program and permits issued thereunder under subsection (b) of this section.

(4) All permits for discharges into the navigable waters issued pursuant to section 13 of the Act of March 3,

1899, shall be deemed to be permits issued under this title, and permits issued under this title shall be deemed to be permits issued under section 13 of the Act of March 3, 1899, and shall continue in force and effect for their term unless revoked, modified, or suspended in accordance with the provisions of this Act.

(5) No permit for a discharge into the navigable waters shall be issued under section 13 of the Act of March 3, 1899, after the date of enactment of this title [enacted Oct. 18, 1972]. Each application for a permit under section 13 of the Act of March 3, 1899, pending on the date of enactment of this Act [enacted Oct. 18, 1972], shall be deemed to be an application for a permit under this section. The Administrator shall authorize a State, which he determines has the capability of administering a permit program which will carry out the objective of this Act, to issue permits for discharges into the navigable waters within the jurisdiction of such State. The Administrator may exercise the authority granted him by the preceding sentence only during the period which begins on the date of enactment of this Act [enacted Oct. 18, 1972] and ends either on the ninetieth day after the date of the first promulgation of guidelines required by section 304(h)(2) [304(i)(2)] of this Act, or the date of approval by the Administrator of a permit program for such State under subsection (b) of this section whichever date first occurs, and no such authorization to a State shall extend beyond the last day of such period. Each such permit shall be subject to such conditions as the Administrator determines are necessary to carry out the provisions of this Act. No such permit shall issue if the Administrator objects to such issuance.

(b) State permit programs. At any time after the promulgation of the guidelines required by subsection (h)(2) of section 304 [304(i)(2)] of this Act, the Governor of each State desiring to administer its own permit program for discharges into navigable waters within its jurisdiction

may submit to the Administrator a full and complete description of the program it proposes to establish and administer under State law or under an interstate compact. In addition, such State shall submit a statement from the attorney general (or the attorney for those State water pollution control agencies which have independent legal counsel), or from the chief legal officer in the case of an interstate agency, that the laws of such State, or the interstate compact, as the case may be, provide adequate authority to carry out the described program. The Administrator shall approve each such submitted program unless he determines that adequate authority does not exist:

(1) To issue permits which--

(A) apply, and insure compliance with, any applicable requirements of sections 301, 302, 306, 307, and 403;

(B) are for fixed terms not exceeding five years; and

(C) can be terminated or modified for cause including, but not limited to, the following:

(i) violation of any condition of the permit;

(ii) obtaining a permit by misrepresentation, or failure to disclose fully all relevant facts;

(iii) change in any condition that requires either a temporary or permanent reduction or elimination of the permitted discharge;

(D) control the disposal of pollutants into wells;

(2) (A) To issue permits which apply, and insure compliance with, all applicable requirements of section 308 of this Act or

(B) To inspect, monitor, enter, and require reports to at least the same extent as required in section 308 of this Act;

(3) To insure that the public, and any other State the waters of which may be affected, receive notice of each

application for a permit and to provide an opportunity for public hearing before a ruling on each such application;

(4) To insure that the Administrator receives notice of each application (including a copy thereof) for a permit;

(5) To insure that any State (other than the permitting State), whose waters may be affected by the issuance of a permit may submit written recommendations to the permitting State (and the Administrator) with respect to any permit application and, if any part of such written recommendations are not accepted by the permitting State, that the permitting State will notify such affected State (and the Administrator) in writing of its failure to so accept such recommendations together with its reasons for so doing;

(6) To insure that no permit will be issued if, in the judgment of the Secretary of the Army acting through the Chief of Engineers, after consultation with the Secretary of the department in which the Coast Guard is operating, anchorage and navigation of any of the navigable waters would be substantially impaired thereby;

(7) To abate violations of the permit or the permit program, including civil and criminal penalties and other ways and means of enforcement;

(8) To insure that any permit for a discharge from a publicly owned treatment works includes conditions to require the identification in terms of character and volume of pollutants of any significant source introducing pollutants subject to pretreatment standards under section 307(b) of this Act into such works and a program to assure compliance with such pretreatment standards by each such source, in addition to adequate notice to the permitting agency of (A) new introductions into such works of pollutants from any source which would be a new source as defined in section 306 if such source were discharging pollutants, (B) new introductions of pollutants into such works from a source which would be subject to section 301 if it were discharging such pollutants, or (C) a substantial change in volume or character of pollutants being

introduced into such works by a source introducing pollutants into such works at the time of issuance of the permit. Such notice shall include information on the quality and quantity of effluent to be introduced into such treatment works and any anticipated impact of such change in the quantity or quality of effluent to be discharged from such publicly owned treatment works; and

(9) To insure that any industrial user of any publicly owned treatment works will comply with sections 204(b), 307, and 308.

§ 1361. Administration

(a) Authority of Administrator to prescribe regulations. The Administrator is authorized to prescribe such regulations as are necessary to carry out the functions under this Act.

§ 1362. Definitions

Except as otherwise specifically provided, when used in this Act:

(1) The term "State water pollution control agency" means the State agency designated by the Governor having responsibility for enforcing State laws relating to the abatement of pollution.

(2) The term "interstate agency" means an agency of two or more States established by or pursuant to an agreement or compact approved by the Congress, or any other agency of two or more States, having substantial powers or duties pertaining to the control of pollution as determined and approved by the Administrator.

(3) The term "State" means a State, the District of Columbia, the Commonwealth of Puerto Rico, the Virgin Islands, Guam, American Samoa, the Commonwealth of

the Northern Mariana Islands, and the Trust Territory of the Pacific Islands.

(4) The term "municipality" means a city, town, borough, county, parish, district, association, or other public body created by or pursuant to State law and having jurisdiction over disposal of sewage, industrial wastes, or other wastes, or an Indian tribe or an authorized Indian tribal organization, or a designated and approved management agency under section 208 of this Act.

(5) The term "person" means an individual, corporation, partnership, association, State, municipality, commission, or political subdivision of a state, or any interstate body.

(6) The term "pollutant" means dredged spoil, solid waste, incinerator residue, sewage, garbage, sewage sludge, munitions, chemical wastes, biological materials, radioactive materials, heat, wrecked or discarded equipment, rock, sand, cellar dirt and industrial, municipal, and agricultural waste discharged into water. This term does not mean (A) " sewage from vessels or a discharge incidental to the normal operation of a vessel of the Armed Forces" within the meaning of section 312 of this Act; or (B) water, gas, or other material which is injected into a well to facilitate production of oil or gas, or water derived in association with oil or gas production and disposed of in a well, if the well used either to facilitate production or for disposal purposes is approved by authority of the State in which the well is located, and if such State determines that such injection or disposal will not result in the degradation of ground or surface water resources.

(7) The term "navigable waters" means the waters of the United States, including the territorial seas.

(8) The term "territorial seas" means the belt of the seas measured from the line of ordinary low water along that portion of the coast which is in direct contact with the open sea and the line marking the seaward limit of inland waters, and extending seaward a distance of three miles.

(9) The term "contiguous zone" means the entire zone established or to be established by the United States under article 24 of the Convention of the Territorial Sea and the Contiguous Zone.

(10) The term "ocean" means any portion of the high seas beyond the contiguous zone.

(11) The term "effluent limitation" means any restriction established by a State or the Administrator on quantities, rates, and concentrations of chemical, physical, biological, and other constituents which are discharged from point sources into navigable waters, the waters of the contiguous zone, or the ocean, including schedules of compliance.

(12) The term "discharge of a pollutant" and the term "discharge of pollutants" each means (A) any addition of any pollutant to navigable waters from any point source, (B) any addition of any pollutant to the waters of the contiguous zone or the ocean from any point source other than a vessel or other floating craft.

(13) The term "toxic pollutant" means those pollutants, or combinations of pollutants, including disease-causing agents, which after discharge and upon exposure, ingestion, inhalation or assimilation into any organism, either directly from the environment or indirectly by ingestion through food chains, will, on the basis of information available to the Administrator, cause death, disease, behavioral abnormalities, cancer, genetic mutations, physiological malfunctions (including malfunctions in reproduction) or physical deformations, in such organisms or their offspring.

(14) The term "point source" means any discernible, confined and discrete conveyance, including but not limited to any pipe, ditch, channel, tunnel, conduit, well, discrete fissure, container, rolling stock, concentrated animal feeding operation, or vessel or other floating craft, from which pollutants are or may be discharged. This term does

not include agricultural stormwater discharges and return flows from irrigated agriculture.

(15) The term "biological monitoring" shall mean the determination of the effects on aquatic life, including accumulation of pollutants in tissue, in receiving waters due to the discharge of pollutants (A) by techniques and procedures, including sampling of organisms representative of appropriate levels of the food chain appropriate to the volume and the physical, chemical, and biological characteristics of the effluent, and (B) at appropriate frequencies and locations.

(16) The term "discharge" when used without qualification includes a discharge of a pollutant, and a discharge of pollutants.

(17) The term "schedule of compliance" means a schedule of remedial measures including an enforceable sequence of actions or operations leading to compliance with an effluent limitation, other limitation, prohibition, or standard.

(18) The term "industrial user" means those industries identified in the Standard Industrial Classification Manual, Bureau of the Budget, 1967, as amended and supplemented, under the category "Division D--Manufacturing" and such other classes of significant waste producers as, by regulation, the Administrator deems appropriate.

(19) The term "pollution" means the man-made or man-induced alteration of the chemical, physical, biological, and radiological integrity of water.

(20) The term "medical waste" means isolation wastes; infectious agents; human blood and blood products; pathological wastes; sharps; body parts; contaminated bedding; surgical wastes and potentially contaminated laboratory wastes; dialysis wastes; and such additional medical items as the Administrator shall prescribe by regulation.

(21) Coastal recreation waters.

(A) In general. The term "coastal recreation waters" means--

(i) the Great Lakes; and

(ii) marine coastal waters (including coastal estuaries) that are designated under section 303(c) by a State for use for swimming, bathing, surfing, or similar water contact activities.

(B) Exclusions. The term "coastal recreation waters" does not include--

(i) inland waters; or

(ii) waters upstream of the mouth of a river or stream having an unimpaired natural connection with the open sea.

(22) Floatable material.

(A) In general. The term "floatable material" means any foreign matter that may float or remain suspended in the water column.

(B) Inclusions. The term "floatable material" includes--

(i) plastic;

(ii) aluminum cans;

(iii) wood products;

(iv) bottles; and

(v) paper products.

(23) Pathogen indicator. The term "pathogen indicator" means a substance that indicates the potential for human infectious disease.

(24) Oil and gas exploration and production. The term "oil and gas exploration, production, processing, or treatment operations or transmission facilities" means all field activities or operations associated with exploration, production, processing, or treatment operations, or transmission facilities, including activities necessary to prepare a site for drilling and for the movement and placement of drilling equipment, whether or not such field activities or operations may be considered to be construction activities.

§ 1370. State authority

Except as expressly provided in this Act, nothing in this Act shall (1) preclude or deny the right of any State or political subdivision thereof or interstate agency to adopt or enforce (A) any standard or limitation respecting discharges of pollutants, or (B) any requirement respecting control or abatement of pollution; except that if an effluent limitation, or other limitation, effluent standard, prohibition, pretreatment standard, or standard of performance is in effect under this Act, such State or political subdivision or interstate agency may not adopt or enforce any effluent limitation, or other limitation, effluent standard, prohibition, pretreatment standard, or standard of performance which is less stringent than the effluent limitation, or other limitation, effluent standard, prohibition, pretreatment standard, or standard of performance under this Act; or (2) be construed as impairing or in any manner affecting any right or jurisdiction of the States with respect to the waters (including boundary waters) of such States.

NOTICE OF PROPOSED RULEMAKING

REPRODUCED FOLLOWING

Federal Register/ Vol. 71, No. 109/ Wednesday, June 7 2006/ Proposed Rules

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 122

[EPA-HQ-OW-2006-0142; FRL-8180-7]

RIN 2040-AE86

National Pollutant Discharge Elimination System (NPDES) Water Transfer Proposed Rule

AGENCY: Environmental Protection Agency (EPA).

ACTION: Proposed rule.

SUMMARY: EPA is proposing an amendment to its Clean Water Act (CWA) regulation to expressly exclude water transfers from regulation under the National Pollutant Discharge Elimination System (NPDES) permitting program. The proposed rule would define water transfers as an activity that conveys waters of the United States to another waster of the United States without subjection the water to intervening industrial, municipal, or commercial use. This proposed rule focuses exclusively on water transfers and is not relevant to whether any other activity is subject to the CWA permitting requirement.

DATES: Comments must be received on or before July 24, 2006.

ADDRESSES: Submit your comments, identified by Docket ID No. EPA-HQ-OW-2006-0141 by one of the following methods:

(1) Federal eRulemaking Portal: *http://www.regaulations.gov*. Follow the on-line instructions for submitting comments. EPA prefers to receive comments submitted electronically.

(2) E-mail: *ow-docket@epa.gov*, Attention Docket ID No. EPA-HQ-OW-2006-0141.

(3) Mail: Send the original and three copies of your comments to: Water Docket, Environmental Protection Agency, Mailcode 4203M, 1200 Pennsylvania Ave., NW., Washington, DC 20460, Attention Docket ID No. EPA-HQ-OW-2006-0141.

(4) Hand Delivery: Deliver your comments to : EPA Docket Center, EPA West, Room B102, 1301 Constitution Avenue, NW., Washington, DC, Attention Docket ID No. EPA-HQ-OW-2006-0141. Such deliveries are only accepted during the Docket's normal hours of operation and special arrangements should be made.

Instructions: Direct your comments to Docket ID No. EPA-HQ-OW-2006-0141. EPA's policy is that all comments received will be included in the public docket without change and may be made available online at http://www.regualtions.gov, including any personal information provided, unless the comment include information claimed to be Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. Do not submit information that you consider to be CBI or otherwise protected through regulations.gov Web sites are "anonymous access" systems, which means EPA will not know your identity or contact information unless you provide it in the body of your comment. If you send an e-mail comment directly to EPA without going through regulations.gov, your e-mail address will be automatically captured and included as part of the comment that is placed in the public docket and made available on the Internet. If you submit an electronic comment, EPA recommends that you include your name and other contact information in the body of your comment

and with any disk or CD-ROM you submit. If EPA cannot read your comment due to technical difficulties and cannot contact you for clarification, EPA may not be able to consider your comment. Electronic files should avoid the use of special characters, any form of encryption, and be free of any defects or viruses.

Docket: All documents in the docket are listed in the regulations index at *http:/www.regulations.gov/*. Although listed in the index, some information is not publicly available, i.e., CBI or other information whose disclosure is restricted by statute. Certain other material, such as copyrighted material, is not placed on the Internet and will be publicly available only in hard copy form. Publicly available docket materials are available either electronically at http://www.regulations.gov or in hard copy at the Water Docket in the EPA Docket Center, EPA West, Room B102, 1301 Constitution Ave., NW., Washington, DC. The Public Reading room is open from 8:30 am. To 4:30 p.m., Monday through Friday, excluding legal holidays. The telephone number for the Public Reading Room is (202) 566-1744, and the telephone number for the Water Docket is (202) 566-2426.

FOR FURTHER INFORMATION CONTACT: For additional information contact Jeremy Arling, Water Permits Division, Office of Wastewater Management (4203M), Environmental Protection Agency, 1200 Pennsylvania Ave., NW., Washington, DC 20460; telephone number" 20564-2218, e-mail address: arling.jeremy@epa.gov.

SUPPLEMENTARY INFORMATION:

I. General Information
A. Does This Action Apply to Me?
B. What Should I Consider as I Prepared My Comments for EPA?
II. Background
III. Rationale

A. Statutory Language and Structure
B. Legislative History
C. Conclusion
IV. Scope of This Proposed Rule
V. Designation Authority
VI. Statutory and Executive Order Reviews
A. Executive Order 12866: Regulatory Planning and Review
B. Paperwork Reduction Act
C. Regulatory Flexibility Act
D. Unfunded Mandates Reform Act
E. Executive Order 13132: Federalism
F. Executive Order 13175: Consultation and Coordination With Indian Tribal Governments
G. Executive Order 13045: Protection of Children From Environmental Health and Safety Risks
H. Executive Order 13211: Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use
I. National Technology Transfer and Advancement Act

I. General Information

A. Does This Action Apply to Me?

This action applies to those involved in the transfer of waters of the United States. The following table provides a list of standard industrial codes for operations covered under this revised rule.

Category	NAICS	Example of potentially affected entities
Resource management parties (includes state departments of fish and wildlife, state departments	924110 Administrati Resource and Soli Programs.	Government establishments primarily engaged in the administration, regulation, and enforcement of water resource programs; the

of pesticide regulations, state environmental agencies, and universities).		administration and regulation of water pollution control and prevention programs; the administration and regulation of drainage development and water resource consumption programs; and coordination of these activities at intergovernmental levels.
	924120 Administration of Conservation Programs.	Government establishments primarily engaged in the administration, regulation , supervision and control of land use, including recreational areas; conservation and preservation of natural resources; erosion control; geological survey program administration; weather forecasting program administration; and the administration and protection of publicly and privately owned forest lands. Government establishments responsible for planning,

		management, regulation and conservation of game, fish, and wildlife populations, including wildlife management areas and field stations; and other administrative matters relation to the protection of fish, game, and wildlife are included in this industry.
	237110 Water and Sewer Line and Related Structures Construction.	This category includes entities primarily engaged in the construction of water and sewer lines, mains, pumping stations, treatment plants and storage tanks.
	237990 Other Heavy and Civil Engineering Construction.	This category includes dam Construction and management, flood control structure construction, drainage canal and ditch construction, flood control project construction, and spillway, floodwater, construction.
Public Water Supply	221310 Water Supply	This category includes entities engaged in operating water treatment plants and/or operating water supply systems. The water supply system may include pumping

		stations, aqueducts, and/or distribution mains. The water may be used for drinking, irrigation, or other uses.

This table is not intended to be exhaustive, but rather provides a guide for readers regarding entities likely to be regulated by this action. This table lists the types of entities that EPA is now aware could potentially be affected by this action. Other types of entities not listed in the table could also be regulated. EPA welcomes comment identifying those other entities. If you have questions regarding the applicability of this action to a particular entity, consult the person listed in the proceeding **FOR FURTHER INFORMATION CONTACT** section.

B. What Should I Consider as I Prepare My Comments for EPA?

1. *Submitting Confidential Business Information.* Do not submit this information to EPA through regulations.gov or e-mail. Clearly mark the part or all of the information that you claim to be CBI. For CBI information in a disk or CD ROM that you mail to EPA, mark the outside of the disk or CD ROM as CBI and then identify electronically within the disk or CD ROM the specific information that is claimed as CBI. In addition to one complete version of the comment that includes information claimed as CBI, a copy of the comment that does not contain the information claimed as CBI must be submitted for inclusion in the public docket. Information so marked will not be disclosed except in accordance with procedures set forth in 40 CRF part 2.

2. *Tips for Preparing Your Comments.* When submitting comments, remember to:

i. Identity the rulemaking by docket number and other identifying information (subject heading, **Federal Register** date and page number).

ii. Follow directions—The Agency may ask you to respond to specific questions or organize comments by referencing a Code of Federal Regulation (CFR) part or section number.

iii. Explain why you agree or disagree; suggest

alternatives and substitute language for your requested changes.

iv. Describe any assumptions and provide any technical information and/or data that you used.

v. If you estimate potential costs or burdens, explain how you arrived at you r estimate in sufficient detail to allow for it to be reproduced.

vi. Provide specific examples to illustrate your concerns, and suggest alternatives.

vii. explain your views as clearly as possible.

viii. Make sure to submit your comments by the comment period deadline identified.

II. Background

Water transfers occur routinely and in many different contexts across the United States. Typically, water transfers route water through tunnels, channels and/or natural stream water features, and either pump or passively direct it for uses such as providing public water supply, irrigation, power generation, flood control, and environmental restoration. Water transfers can be relatively simple, moving a small quantity of water a short distance on the same stream, or very complex, transporting substantial quantities of water over long distances, across both state and basin boundaries. There are thousands of water transfers currently in major diversion projects in the western States alone. Examples include the Colorado-Big Thompson Project in Colorado and the Central Valley Project in California.

Water transfers are administered by various federal, State, and local agencies and other entities. The Bureau of Reclamation administers significant transfer in western States to provide approximately 140,000 farmers with irrigation water transfers, the Army Corps of Engineers keeps thousands of acres of agricultural and urban land in southern Florida from flooding in former areas of Everglades wet lands. Many large cities in the west and

the east would not have adequate sources of water for their citizens were it not for the continuous redirection of water form outside basins. For example, both the cities of New York and Los Angeles are dependent on water transfers form distant watersheds to meet their municipal demand. In short, numerous States, localities, and residents are dependent upon water transfers, and these transfers are an integral component of U.S. infrastructure.

Although there have been a few isolated instances where entities responsible for water transfers have been issued NPDES permits, EPA is aware of only one State that has a practice of issuing NPDES permits for water transfers.[1] Water transfers are not generally subject to section 402 of the Clean Water Act. However, the Act reserves the ability of States to regulate water transfers under State law and this proposed rulemaking does not affect this state prerogative. *See* **CWA** section 510.

The question of whether or not an NPDES permit is required for water transfers has arisen because activities that result in the movement of waters of the U.S., such as trans-basin transfers of water to serve municipal, agricultural, and commercial needs, can also move pollutants from one waterbody (donor water) to another (receiving water). The Supreme Court recently discussed this issue in South Fla. Water Mgmt. Dist. F. Miccosukee Tribe of Indians, 541 U.S. 95 (2004), leaving the matter unresolved. In this case, the Supreme Court vacated a decision by the 11th Circuit, which had held that a Clean Water Act permit was required for transferring water from

---

[1] For instance, courts required NPDES permits for water transfers associated with the expansion of a ski resort and the supply of drinking water. See Dubois v. United States Dept. of Ag., 103 F.3d 1273 (1st Cir 1996) and Catskill Mountains Chapter of Trout Unlimited, Inc. v. City of New York, 273 F.3d 481 (2nd Cir 2001). Pennsylvania began issuing permits for water transfers in 1986, in response to a State court decision mandating the issuance of such permits. DELAWARE Unlimited v. DER, 508 A.2d 348 (Pa Cmwlth, 1986).

one navigable water form on navigable water into another, a Water Conservation Area in the Florida Everglades. The Court remanded the case for further fact-finding as to whether the two waters in question were "meaningfully distinct." If they were not, no permit would be required. The Court declined to address legal arguments made by these legal issues in an administrative document. 541 U.S. at 107.

On August 5, 2005, EPA issued a legal memorandum entitled "Agency Interpretation on Applicability of Section 402 of the Clean Water Act to Water transfers." (interpretive memorandum) The precise legal question addressed in the interpretive memorandum was whether the movement of pollutants potentially subjecting the activity to the permitting requirement under section 402 of the Act. Based on the statute as a whole and consistent with the Agency's longstanding practice, the interpretive memorandum concluded that Congress intended for water transfers to be subject to oversight by water resource management agencies and State non-NPDES authorities, rather than the permitting program under section 402 of the CWA.

Today, EPA is proposing an amendment to its Clean Water Act (CWA) regulations to expressly exclude water transfers from regulation under section 402 of the CWA. The proposed rule would define water transfers as an activity that conveys waters of the United States to another water of the United States without subjecting the water to intervening industrial, municipal, or commercial use. This proposed rule focuses exclusively on water transfers and is not relevant to the CWA permitting requirement.

This proposed rule is organized as follows. Section III discusses the rationale for this exclusion, based on the language, structure, and legislative history of the Clean Water Act; section IV describes the scope of this proposed rule; and section V describes "designation authority" as an additional element that eh Agency chose not to propose but

for which the Agency is interested in receiving public comment.

III. Rationale

As stated in EPA's August 5th interpretive memorandum (available at Docket No. EPA-HQ-OW-2006-0141), based on the CWA as a whole, the Agency concludes that Congress intended to leave the oversight of water transfers to authorities other than the NPDES programs. This proposed rule is based on the legal analysis contained in the interpretive memorandum and explained below.

Statutory construction principles instruct that the Clean Water Act should be interpreted by analyzing the statute as a whole. *United State v. Boisdore's Heirs*, 49 U.S. 113, 122 (1850). The Supreme Court has long explained "in expounding a statute, we must not be guided by a single sentence or member of a sentence, but look to the provisions of the whole law, and its object and policy." *Id. see also, Gustafond v. alloyd Co., Inc.*, 513 U.S. 561,570 (1995), *Smith v. United State Nat'l Bank of Or. V. Independent Ins. Agents of Am., Inc.*, 508 U.S. 439, 455 (1993). In general, the "whole statute" interpretation analysis means that "a statute is passed as a whole and not in parts or sections and is animated by one general purpose and intent. Consequently, each part or section should be construed in connection with every other part or section so as to produce a harmonious whole." Norman J. Singer, Statutes and Statutory Construction vol. 2A § 46:05, 154 (6th ed., West Group 2000). As the Second Circuit has explained with regard to the CWA:

Although the canons of statutory interpretation provide a court with numerous avenues for supplementing and narrowing the possible meaning of ambiguous text, most helpful to our interpretation of the CWA in this case are two rules. First, when determining which reasonable meaning should prevail, the text should be placed in the context of the entire statutory structure [quoting *United*

States v. Dauray, 215 F3d 257,262 (2d Cir. 2000)]. Second, absurd results are to be avoided and internal inconsistencies in the statute must be dealt with. *United State v. Turkette*, 452 U.S. 576, 580 (1981).

Natural Res. Def. Council v. Muszynski, 268 F.3d 91, 98 (2d Cir. 2001). See also, Singer, vol. 3B § 77:4, at 256-258.

A holistic approach is needed her in particular because the heart of this matter is the balance Congress created between federal and State oversight of activities affecting the nation's water. The purpose of the CWA is to protect water quality. Congress nonetheless recognized that programs already existed at the State and local levels for managing water quantity, and it recognized the delicate relationship between the CWA and State and local programs. Looking at eh statute as a whole is necessary to ensure that the analysis here is consonant with Congress' overall policies and objectives in the management and regulation of the nation's water resources.

The analysis below addresses in turn the statutory language and structure and the legislative history.

A. Statutory Language and Structure

The Clean Water Act prohibits the discharge of a pollutant by any person except in compliance with specified statutory sections, including section 402. CWA section 301(a). The term "discharge of a pollutant" is defined as "any addition of any pollutant to navigable waters from any point source." CWA section 502(12). Where discharges of pollutants occur, they are generally regulated by a permit under the NPDES program. Discharges of pollutants other than dredged or full material may be authorized by permits issued under section 402 by EPA or States with approved permitting programs. Discharges of dredged or fill material may be authorized by permits issued by Army Corps of Engineers and authorized by permits and authorized States under section

404, and that provision is not addressed or affected by this Agency interpretation.

While no one provision of the Act expressly addresses whether water transfers are subject to the NPDES programs, the specific statutory provision addressing the management of water resources—coupled with the overall statutory structure—support the conclusion that Congress did not intend for water transfers to be regulated under section 402. The Act establishes a variety of programs and regulatory initiatives in addition to the NPDES permitting program. It also recognizes that the States have primary responsibilities with respect to the "development and use (including restoration, preservation, and enhancement) of land and water resources." CWA section101(b).

Congress also made clear that the Clean Water Act is to be construed in a manner that does not unduly interferer with the ability of States to allocate water within their boundaries, stating:

It is the policy of Congress that the authority of each State to allocate quantities of water within its jurisdiction shall not be supersede or abrogate or otherwise impaired by [the Act]. It is the further policy of Congress that nothing in the chapter shall be construed to supersede or abrogate rights to quantities of water which have been established by any State. Federal agencies shall co-operate with State and local agencies to develop comprehensive solutions to prevent, reduce and eliminate pollution in concert with programs for managing water sources.

CWA section 101(g) does not prohibit EPA from taking actions under the CWA that it determines are needed to protect water quality,[2] it nonetheless establishes Congress

[2] PUD No. 1 of Jefferson County v. Wash. State Dep't. of Ecology. 511 U.S. 700, 720 (1994) ("Sections 101(g) and 510(2) preserve the authority of each State to allocate water quantity as between users; they do not limit the scope of water pollution controls that may be imposed on users who have obtained, pursuant to state law, a water allocation.")

general direction against unnecessary Federal interference with State allocations of water rights.

Water transfers are an essential component of the nation's infrastructure for delivering water that users are entitled to receive under State law. Because subjecting water transfers to be a federal permitting scheme could unnecessarily interfere with State decisions on allocations of water rights, this section provides additional support for the Agency's interpretation that absent a clear Congressional intent to the contrary, it is reasonable to read the statute as not requiring NPDES permits for water transfer. See United States v. Bass, 404 U.S. 336, 349 (1971) ("unless Congress conveys its purpose clearly, it will not be deemed to have significantly changed the federal-state balance.") A second statutory provision, section 510(2)m similarly provides:

Except as expressly provided in the Act, nothing in this Act shall * * * be construed as impairing or in any manner affecting any right or jurisdiction of the States with respect to the waters (including boundary wasters) of such States.

Like section 101(g), this provision supports the notion that Congress did not intend administration of the CWA to unduly interfere with water resource allocation.

Finally, one section of the Act 304(f)—expressly addresses water management activities. Mere mention of an activity in section 304(f) does not explicitly exempt nonpoint sources in nature. See Miccosukee at 106 (noting that section 304(f)(2)(F) does not explicitly exempt non point sources if they also fall within the definition of point source). Nonetheless, section 304(f) is focused primarily on addressing pollution sources outside the scope of the NPDES program. See H.R. Rep. No. 92-911, at 109(1972), reprinted in Legislative History of the Water Pollution Control Act Amendments of 1972 Amendments") (emphasis added)). This section directed EPA to issued guidelines for identifying and evaluating the

nature and extent of nonpoint sources of pollutants,[3] as well as processes, procedures and methods to control pollution from, among other things, "changes in the movement, flow or circulation of any navigable waters or ground waters, including changes caused by the construction of dams, levees, channels, causeways, or flow diversion facilities. "CWA 304(f)(2)(F) (emphasis added).

While section 304(f) does not exclusively address nonpoint sources of pollution, it nonetheless "concern nonpoint sources" (Miccosukee, 541 U.S. at 106) and reflects an understanding by Congress that water movement could result in pollution, and that such pollution would be managed by States under their nonpoint source program authorities, rather than the NPDES program. This proposed rule accords with the direction to EPA and other federal agencies in section 101(g) to work with State and local agencies to develop "comprehensive solutions" to water pollution problems " in concert with programs for managing water resources."

Thus, these section of the Act together demonstrate that Congress was aware that there might be pollution associated with water management activities, but chose to defer to comprehensive solutions developed by state and local agencies for controlling such pollution. Because the NPDES program only focuses on water pollution from point source discharges, it is not the kind of comprehensive program that Congress believed was best suited to addressing pollution that may be associated with water transfers.

In contrast with these provisions of the statute which

---

[3] Sources not regulated under sections 402 or 404 are generically referred to as "nonpoint sources." See National Wildlife Fed'n v. Consumers Power Co., 862 F. 2d 580, 582 (6th Cir. 1988) ("nonpoint source" is shorthand for and "includes all water quality problems not subject to section 402") (quoting Natinal Wildlife Fed'n v. Gorsuch. 693 F.2d 156, 166)(D.C. Cir. 1982) (internal quotation marks omitted)).

expressly address water management activities, the general prohibition and definition sections of the statute do not explicitly discuss water management. Section 301(a) of the Act proscribes "the discharge of any pollutant by any person" except in compliance with specified sections of the CWA section 502(12). While the statute 101(g), 102(b), 304(f) and 510(2) provide a strong indication that the term "addition" with those more specific sections of the statute. In light of Congress' clearly expressed policy not to unnecessarily interfere with water resource allocation and its inclusion of changes in the movement, flos or circulation of any water of the U.S. in a section of the Act addressing sources of pollutants that would not be subject to regulation under section 402, it is reasonable to interpret "addition" as not generally including the mere transfer of waters from one water of the U.S. to another.

The overall structure of the statute further supports this conclusion. In several important ways, water transfers are unlike the types of discharges that were the primary focus of Congressional attention in 1972. Discharges of pollutants covered by section 402 are subject of "effluent" limitations. Water transfers, however, are not like effluent from and industrial, commercial or municipal operation. Rather than discharge effluent, water transfers release one water of the U.S. into another.

The operators of water control facilities are generally not responsible for the presence of pollutants in the waters they transport. Rather, those pollutants often enter "the waters of the United States" through point and nonpoint sources located far from those facilities and beyond control of the project operators. Congress generally intended that pollutants be controlled at the source whenever possible. See S. Rep. No. 92-414, p. 77 (1972) (justifying the broad definition of navigable waters because it is "essential that discharges of pollutants be controlled at the source").[4] The

[4] Recognition of a general intent to control pollutants at the source does not mean that dischargers are responsible only or pollutants that they

pollutants in transferred waters are more sensibly addressed through water resource planning and land use regulations, which attack the problem at its source. See, e.g., CWA section 102(b) (reservoir planning); CWA section 208(b)(2)(F) (land use planning to reduce agricultural nonpoint sources of pollution); CWA section 319 (nonpoint source management programs); and CWA section 401(state certification of federally licensed projects). Congress acknowledged this when it directed Federal agencies to co-operate with State and local agencies to develop comprehensive solutions to prevent, reduce and eliminate pollution in concert with programs for managing water sources.

The Agency, therefore, concludes that, taken as a whole, the statutory language and structure of the Clean Water Act indicate that Congress did not generally intend to subject water transfers to the NPDES program. Rather, Congress intended to leave oversight of water transfers to water resource management agencies and the States in cooperation with Federal authorities.

B. Legislative History

The legislative history of the Clean Water Act also supports this conclusion. First, the legislative history of section 101(g) reveals that "(i)t is the purpose of this (provision) to insure that state [water] allocation system are not subverted." 3 Congressional Research Serv., U.S. Library of Congress, Serial No. 95-14, A Legislative History of the Clean Water Act of 1977, at 532 (1978); see PUD No. 1 of Jefferson County v. Washington Dep't of Ecology, 511 U.S. 700,721 (1994).

Notably, the legislative history of the Act discusses water

---

generate; rather, point sources need only convey pollutants into navigable waters to be subject to the Act. See Miccosukee at 105. Municipal separate storm sewer systems, for example are clearly subject to regulation under the Act. CWA section 402(p).

flow management activities only in the context of the nonpoint source program. In discussing section 304(f), the House Committee Report specifically mentioned water flow management as an area where EPA would provide technical guidance to States for their nonpoint source programs, rather than an area to be regulated under section 402.

This section and the information on such nonpoint sources is among the most important in the 1972 Amendments. * * * natural and manmade changes in the normal flow of surface and ground waters.

H.R. Rep. No. 92-911, at 109 (1972) (emphasis added).

In the legislative history of section 208 if the Act, the House Committee report noted that in some States, water resource management agencies allocating stream flows are required to consider water quality impacts. The Report stated:

[I]n some States water resource development agencies are responsible for allocation of stream flow and are required to give full consideration to the effects on water quality. To avoid duplication, the Committee believes that a State which has an approved program for the handling of permits under section 402, and which has a program for water resource allocation should continue to exercise the primary responsibility in both of these areas and thus provide a balanced management control system.

H.R. Rep. No. 92-911, at 96 (1972).

Thus, Congress recognized that he new section 402 permitting program was not the only viable approach of addressing water quality issues associated with State water resource management. The legislative history makes clear that Congress did not intend a wholesale transfer of responsibility for water quality away from water resource agencies to the NPDES authority. Rather, Congress encouraged States to obtain approval of authority to

administer the NPDES program under section 402(b) so that the NPDES program could work in concert with water resource agencies' oversight of water management activities to ensure a "balanced management control system" Id.

C. Conclusion

In sum, the language, structure, and legislative history of the statute all support the conclusion that Congress did not intend to subject water transfers to the NPDES program. Water transfers are an integral part of water resource management; they embody how State nation's water resources and balance competing needs for water. Water transfers also physically implement State regimes for allocating water rights, many of which existed long before enactment of the Clean Water Act. Congress was aware of those regimes, and did not want to impair the ability of these agencies to carry them out. Finding the NPDES program generally inapplicable to water transfers is true to this intent and the structure of the Clean Water Act, and gives meaning to sections 101(g) and 304(f) of the Act.

IV. Scope of This Proposed Rule

This proposed rule would expressly exclude discharges from water transfers from requiring an NPDES permit. The rule would define a water transfer as an activity that conveys waters of the United States to another water of the United States without subjecting the water to intervening industrial, municipal, or commercial use. Waters of the U.S. are defined for purposes of the NPDES program in the Code of Federal Regulations in § 122.2.

A water transfer occurs between two "waters of the United States." Accordingly, the movement of water through a dam is not a water transfer because the dam merely conveys water from one location to another within the same waterbody. However, in both cases (water transfers between distinct water bodies and movement of

waters within the same waterbody), an NPDES permit is not required because no "addition" of a pollutant has occurred.

Water transfer facilities should be able to be operated an maintained in a manner which ensures that they do not add pollutants to the water being transferred. If no pollutants are added, a permit would not be required. However, where these point sources do add pollutants to water passing through the structure into the downstream water, NPDES permits are required. *Consumer Power*, 862 F.2d at 588; *Gorsuch*, 693 F.2d at 165, n. 22. Nothing in this rulemaking affects EPA's longstanding approach to regulation of such discharges under section 402.

This proposed rule would not affect EPA's longstanding position that, if water is withdrawn form waters of the U.S. for an intervening industrial, municipal or commercial use, the reintroduction of the intake water and associated pollutants is an "addition" subject to NPDES permitting requirements. EPA has long imposed NPDES requirements on entities that withdraw process water or cooling water and then return some or all of the water through a point source. See, e.g., 40 CFR 122.2 (definition of process wastewater); 40 CFR 125.80-125.89 (regulation of cooling towers); 40 CFR 122.45(g) (regulations governing intake pollutants for technology-based permitting); 40 CFR part 132, Appendix F, Procedure 5-D (containing regulation governing water quality-based permitting for intake pollutants in the great Lakes). Moreover, a discharge form a waste treatment system, for example, to a water of the United States, would not constitute a water transfer (and would require an NPDES permit). See 40 CFR 122.2. These situations are distinguished from the water transfers that are the subject of this notice because if water is withdrawn form navigable waters for an intervening industrial, municipal or commercial use, the reintroduction of the intake water and associated pollutants physically introduces pollutants from

the outside world into navigable waters and, therefore, is an "addition " subject to NPDES permitting requirements. The fact that some of the pollutants in the discharge may have been present in the source water does not remove the need for a permit, although, under some circumstances, permittees may receive "credit" in their effluent limitations for such pollutants. See, 40 CFR 122.45(g) (regulations governing intake pollutants for technology-based permitting); 40 CFR part 132, Appendix F, Procedure 5-D (containing regulations governing water quality-based permitting for intake pollutants in the Great Lakes).

Similarly, an NPDES permit is normally required if a facility withdraws water form a water of the U.S., removes preexisting pollutants to purify the water, and then discharges the removed pollutants (perhaps in concentrated form) back into the water of the U.S. while retaining the purified water for use in the facility. An example of this situation is drinking water treatment facilities, which withdraw water from streams, rivers, and lakes. The withdrawn water typically contains suspended solids, which must be removed to make the water potable. The removed solid are a waste materials from the treatment process and, if discharged into waters of the U.S., are subject to NPDES permitting requirements, even though that waste material originated in the withdrawn water. See, e.g., In re City of Phoenix, Arizona Squaw Peak & Deer Valley Water Treatment Plants, 9 E.A.D. 515, 2000 WL 1664964 (EPA Envtl. App. Bd. November 1, 2000) (rejecting, on procedural grounds, challenges to NPDES permits for two drinking water treatment plants that draw raw water from the Arizona Canal, remove suspended solids to purify the water, and discharge the solids back into the Canal; Final NPDES General Permits for two drinking water, and discharge the solids back into the Canal; Final NPDES General Permits for Water Treatment Facility Discharges in the State of Massachusetts and New Hampshire, 65 FR 69,000 (2000) (NPDES permits for

discharges of process wastewaters from drinking water treatment plants).

Waters that are diverted and used for irrigation and then reintroduced to the waters of the U.S. are exempt from permitting requirements under the exemption for return flows from irrigates agriculture from the definition of "point source" in section 502(14) and this Agency interpretation does not affect that exemption.

The activities addressed by this proposed rule also stand in sharp contrast to other activities the have long been subject to the Clean Water Act's permitting requirements. For example, section 402 subjects placer mining of ore deposits in streams and rivers to the NPDES permitting program because the process results in the excavation and point source discharge of dirt and gravel into waters of the U.S. See Rybachek v. EPA, 904 F.2d 1276, 1285 (9th Cir. 1990). Similarly, section 404 of the Clean Water Act subjects the deposit or redeposit of dredged or fill material to a specialized permitting program because that activity results in the point source discharge of those materials into navigable waters. See CWA section 404; United States v. Deaton, 209 F.3d 331, 335-336 (4th Cir. 200); United States. M.C.C. of Fla., Inc., 772 F.2d 1501, 1503-1506 (11th Cir. 1988); Avoyelles Sportsmen's League, Inc. v. Marsh, 715 F.2d 897, 923-925 (5th Cir.1983). The Clean Water Act also clearly imposes permitting requirements on publicly owned treatment works, and large and medium municipal separate strom sewer systems. See CWA sections 402(a), 402(p)(1)-(4). Congress amended the Clean Water Act in 1987 specifically to add new section 402(p) to better regulate stormwater discharges from point sources. Water Quality Act of 1987, Public Law 100-4, 101 Stat. 7 (1987). Again, this interpretation does not affect EPA's longstanding regulation of such discharges.

This proposed rule also would not change EPA's longstanding position, upheld by the Supreme Court in Miccosukee, that the definition of "discharge of a

pollutant" in the CWA includes coverage of point sources that do not themselves generate pollutants. The Supreme Court stated, "A point source is, by definition, a 'discernible, confined, and discrete conveyance' Section 1362(14) (emphasis added). That definition makes plain that a point source need not be the original source of the pollutant; it need only convey the pollutant to 'navigable waters,' which are, in turn, defined as 'the waters of the United States.' Section 1362(7)." Miccosukee, 541 U.S. at 105.

EPA solicits comment on the proposed definition of a water transfer. Does the definition properly achieve the Agency's objective of excluding water transfers from NPDES permitting (as intended by Congress) while affirming section 402 jurisdiction over all other currently regulated activities? Does the proposed rule clearly distinguish between situations where the water transfer facility "adds" pollutants to the water being transferred and thus must obtain a permit, and those situations where waters merely pass through the facility without the addition of any pollutant?

V. Designation Authority

EPA considered, but ultimately did not propose, an additional provision allowing States to designate particular water transfers as subject to the NPDES program on a case-by-case basis. EPA did not select this option but is seeking comment on it.

Under this approach, the permitting authority would have the discretion to issue a permit on a case-by-case basis if a transfer would cause a significant impairment of a designated use and no State authorities are being implemented to adequately address the problem. A significant impairment would occur when, as a result of the water transfer, the designated use of the receiving water could no longer be maintained. This designation would be at the sole discretion of the State NPDES authority, and

would only apply in States authorized to implement the section 402 program.

VI. Statutory and Executive Order Reviews

A. Executive Order 12866: Regulatory Planning and Review

Under Executive Order 12866, (58 FR 51735 (October 4, 1993)) the Agency must determine whether the regulatory action is "significant" and therefore subject to Office of Management and Budget (OMB) review and the requirements of the Executive Order. The Order defines "significant regulatory action" as one that is likely to result in a rule that may:

(1) Have an annual effect on the economy of $100 million or more or adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or State, local, or tribal governments or communities;

(2) Create a serious inconsistency or otherwise interfere with an action taken or planned by another agency;

(3) Materially alter the budgetary impact of entitlements, grants, user fees, or loan programs or the rights and obligations of recipients thereof; or

(4) Raise novel legal or policy issues arising out of legal mandates, the President's priorities, or the principles set forth in the Executive Order.

Pursuant to the terms of Executive Order 12866, it has been determined that this rule is a "significant regulatory action." As such, this action was submitted to OMB for review. Changes made in response to OMB suggestions or recommendations will be documented in the public record.

B. Paperwork Reduction Act

This action does not impose an information collection burden under the provisions of the Paperwork Reduction Act, 44 U.S.C. 3501 et seq. This proposed rulemaking would expressly exclude discharges from water transfers

from requiring an NPDES permit. This rule does not seek to require potentially affected entities to generate, maintain, or disclose information to or for a Federal agency and therefore would not impose any information collection burden.

Burden means the total time, effort, or financial resources expended by persons to generate, maintain, retain, or disclose or provide information to or for a Federal agency. This includes the time needed to review instructions; develop, acquire, install, and utilize technology and systems for the purposes of collecting, validating, and verifying information, processing and maintaining information, and disclosing and providing information; adjust the existing ways to comply with any previously applicable instructions and requirements; train personnel to be able to respond to a collection of information; search data sources; complete and review the collection of information; and transmit or otherwise disclose the information.

An agency may not conduct or sponsor, and a person is not required to respond to a collection of information unless it displays a currently valid OMB control number. The OMB control numbers for EPA's regulations in 40 CFR are listed in 40 CFR part 9.

C. Regulatory Flexibility Act

The Regulatory Flexibility Act (RFA) generally requires an agency to prepare a regulatory flexibility analysis of any rule subject to notice and comment rulemaking requirements under the Administrative Procedure Act or any other statute unless the agency certifies that the rule will not have a significant economic impact on a substantial number of small entities. Small entities include small businesses, small organizations, and small governmental jurisdictions.

For purposes of assessing the impacts of today's proposed rule on small entities, small entity is defined as: (1) A small

business as defined by the Small Business Administration's (SBA) regulations at 13 CFR 121.201; (2) a governmental jurisdiction that is a government of a city, county, town, school district or special district with a or population of less than 50,000: and (3) a small organization that is any not-for profit enterprise which is independently owned and operated and is not dominant in its field.

After considering the economic impacts of today's proposed rule on small entities, I certify that this action will not have a significant adverse economic impact on a substantial number of small entities. Because EPA is simply codifying the Agency's longtime position that Congress did not generally intend for the NPDES program to regulate the transfer of waters of the United States into another water of the United States, this proposed action will not impose any requirement on small entities. We continue to be interested in the potential impacts of the proposed rule on small entities and welcome comments on issues related to such impacts.

D. Unfunded Mandates Reform Act

Title II of the Unfunded Mandates Reform Act of 1995 (UMRA), Public Law 104-4, establishes requirements for Federal agencies to assess the effects of their regulatory actions on State, local, and tribal governments and the private sector. Under section 202 of the UMRA, EPA generally must prepare a written statement, including a cost-benefit analysis, for proposed and final rules with "Federal mandates" that may result in expenditures to State, local, and tribal governments, in the aggregate, or to the private sector, of $100 million or more in any one year. Before promulgating an EPA rule for which a written statement is needed, section 205 of UMRA generally requires EPA to identify and consider a reasonable number of regulatory alternatives and adopt the least costly, most cost-effective, or least burdensome alternative that achieves the objectives of the rule. The provisions of section 205 do

not apply when they are inconsistent with applicable law. Moreover, section 205 allows EPA to adopt an alternative other than the least costly, most cost-effective, or least burdensome alternative if the Administrator publishes with the final rule an explanation why that alternative was not adopted. Before EPA establishes any regulatory requirements that may significantly or uniquely affect small governments, including tribal governments, it must have developed under section 203 of the UMRA a small government agency plan. The plan must provide for notifying potentially affected small governments, enabling officials of affected small governments to have meaningful and timely input in the development of EPA regulatory proposals with significant Federal Intergovernmental mandates, and informing, educating, and advising small governments on compliance with the regulatory requirements.

EPA has determined that this proposed rule would not contain a Federal mandate that may result in expenditures of $100 million or more for State, local, and tribal governments, in the aggregate, or the private sector in any one year. EPA is proposing to simply codify the Agency's longtime position that Congress did not generally intend for the NPDES program to regulate the transfer of a water of the United States into another water of the United States. Thus, today's proposed rule is not subject to the requirements of sections 202 and 205 of the UMRA. For the same reason, EPA has determined that this rule contains no regulatory requirements that might significantly or uniquely affect small governments. Thus, today's proposed rule is not subject to the requirements of section 203 of UMRA.

E. Executive Order 13132: Federalism

Executive Order 13132, entitled "Federalism" (64 FR 43255, August 10, 1999), requires EPA to develop an

accountable process to ensure "meaningful and timely input by State and local officials in the development of regulatory policies that have federalism implications." "Policies that have federalism implications" is defined in the Executive Order to include regulations that have "substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government."

Under section 6(b) of Executive Order 13132, EPA may not issue a regulation that has federalism implications, that imposes substantial direct compliance costs, and that is not required by statute, unless the Federal government provides the funds necessary to pay the direct compliance costs incurred by State and local governments, or EPA consults with State and local officials early in the process of developing the proposed regulation. Under section 6(c) of Executive Order 13132, EPA may not issue a regulation that has federalism implications and that preempts State law, unless the Agency consults with State and local officials early in the process of developing the proposed regulation.

EPA has concluded that this proposed rule does not have Federalism implications. It will not have substantial

direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government, as specified in Executive Order 13132. Today's proposed rule does not change the relationship between the government and the States or change their roles and responsibilities. Rather, this proposed rulemaking would confirm the Agency's longstanding practice that Congress generally intended for water transfers to be subject to oversight by water resource management agencies and State non-NPDES authorities, rather than the permitting program under section 402 of the CWA. In addition, EPA does not expect this rule to have

any impact on local governments.

Further, the revised regulations would not alter the basic State-Federal scheme established in the Clean Water Act under which EPA authorizes States to carry out the NPDES permitting program. EPA expects the revised regulations to have little effect on the relationship between, or the distribution of power and responsibilities among, the Federal and State governments. Thus, Executive Order 13132 does not apply to this rule.

Consistent with EPA policy, EPA nonetheless consulted with representatives of State governments early in the process of developing the proposed regulation to permit them to have meaningful and timely input into its development. EPA asked States for data regarding the number of water transfers within their jurisdiction and the mechanisms under State law that could be utilized to address any possibly adverse water quality impacts from those transfers. In considering the designation authority provision, EPA also sought data from the States regarding their use of similar authorities in their stormwater phase II and Concentrated Animal Feeding Operations (CAFO) rules. In addition to data collection, EPA sought States' opinions on water transfers generally, and designation, specifically. States varied in their concerns, with some opposed to NPDES permitting for water transfers and some supportive of an ability to use it.

In the spirit of Executive Order 13132, and consistent with EPA policy to promote communications between EPA and State and local governments, EPA specifically solicits comment on this proposed rule from State and local officials.

F. Executive Order 13175: Consultation and Coordination With Indian Tribal Governments

Executive Order 13175, entitled, "Consultation and Coordination with Indian Tribal Governments" (65 FR 67249, November 9, 2000), requires EPA to develop an

accountable process to ensure "meaningful and timely input by tribal officials in the development of regulatory policies that have tribal implications." "Policies that have tribal implications" is defined in the Executive Order to include regulations that have "substantial direct effects on one or more Indian tribes, on the relationship between the Federal government and the Indian tribes, or on the distribution of power and responsibilities between the Federal government and Indian tribes."

This proposed rule does not have tribal implications. It will not have substantial direct effects on tribal governments, on the relationship between the Federal government and Indian tribes, or on the distribution of power and responsibilities between the Federal government and Indian tribes, as specified in Executive Order 13175. Today's proposed rule would clarify that Congress did not generally intend for the NPDES program to regulate the transfer of waters of the United States into another water of the United States. Nothing in this rule would prevent an Indian Tribe from exercising its own organic authority to deal with such matters. Thus, Executive Order 13175 does not apply to this rule.

In the spirit of Executive Order 13175, and consistent with EPA policy to promote communications between EPA and tribal governments, EPA specifically solicits additional comment on this proposed rule from tribal officials.

G. Executive *Order 13045: Protection of Children From Environmental Health and Safety Risks*

Executive Order 13045: "Protection of Children from Environmental Health Risks and Safety Risks" (62 FR 19885, April 23, 1997) applies to any rule that: (1) Is determined to be "economically significant" as defined under E.O. 12866, and (2) concerns an environmental health or safety risk that EPA has reason to believe may have a disproportionate effect on children. If the regulatory action meets both criteria, the Agency must evaluate the

environmental health or safety effects of the planned rule on children, and explain why the planned regulation is preferable to other potentially effective and reasonably feasible alternatives considered by the Agency.

This regulation is not subject to Executive Order 13045 because it is not economically significant as defined under E.O. 12866, and because the Agency does not have reason to believe that it addresses environmental health and safety risks that present a disproportionate risk to children. Today's proposed rule would simply clarify Congress's intent that water transfers generally be subject to oversight by water resource management agencies and State non-NPDES authorities, rather than the permitting program under section 402 of the CWA.

H. Executive Order 13211: Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use

This proposed rule would not be subject to Executive Order 13211, "Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use" (66 FR 28355 (May 22, 2001)) because it is not an economically significant regulatory action under Executive Order 12866.

I. National Technology Transfer and Advancement Act

Section 12(d) of the National Technology Transfer and Advancement Act of 1995 ("NTFAA"), Public Law 104-113, section 12(d) (15 U.S.C. 272 note) directs EPA to use voluntary consensus standards in its regulatory activities unless to do so would be inconsistent with applicable law or otherwise impractical. Voluntary consensus standards are technical standards (e.g., materials specifications, test methods, sampling procedures, and business practices) that are developed or adapted by voluntary consensus standard bodies. The NTTAA directs EPA to provide Congress, through OMB, explanations when the Agency decides not

to use available and applicable voluntary consensus standards. This proposed rulemaking does not involve technical standards. Therefore, EPA is not considering the use of any voluntary consensus standards.

List of Subjects in 40 CFR Part 122

Environmental protection, Administrative practice and procedure, Confidential business information, Hazardous substances, Reporting and recordkeeping requirements, Water pollution control.

Dated: June 1, 2006.

Stephen L. Johnson,

Administrator.

For the reasons set forth in the preamble, 40 CFR part 122 is proposed to be amended as follows:

PART 122-EPA ADMINISTERED PERMIT PROGRAMS: THE NATIONAL POLLUTANT DISCHARGE ELIMINATION SYSTEM

I. The authority citation for part 122 continues to read as follows:

Authority: The Clean Water Ad, 33 U.S.G. 1251 *et seq.*

2. Section 122.3 is amended by adding paragraph 6) to read as follows:

§122.3 Exclusions.

* * * * *

(i) *Discharges from a water transfer.* Water transfer means an activity that conveys waters of the United States to another water of the United States without subjecting the water to intervening industrial, municipal, or commercial use. This exclusion does not apply to pollutants added by

the water transfer activity itself to the water being transferred.

[FR Doc. E6-8814 Filed 6--6--08; 8:45 am]

BILLNG CODE 6560-50-P

EPA INTERPRETATIÓN

REPRODUCED FOLLOWING

UNITED STATE ENVIRONMENTAL PROTECTION AGENCY
Washington, D. C. 20460

SUBJECT: Agency Interpretation on Applicability of Section 402 of the Clean Water Act to Water Transfers

FROM: Ann R. Klee
General Counsel

Benjamin H. Grumbles
Assistant Administrator for Water

TO: Regional Administrators

This Agency interpretation addresses the question of whether the National Pollutant Discharge Elimination System (NPDES) permitting program under Section 402 of the Clean Water Act (CWA) is applicable to water control facilities that merely convey or connect navigable waters. For purposes of this Agency interpretation, the term "water transfer" refers to any activity that conveys or connects navigable waters (as that term is defined in the CWA) without subjecting the water to intervening industrial, municipal, or commercial use. This interpretation focuses exclusively on water transfers and is not relevant to whether any other activity is subject to the CWA permitting requirement.[1]

[1] Section VI, below, discusses activities that are beyond the scope of, and not affected by, this Agency interpretation.

I. Overview

The question of whether or not an NPDES permit is required for water transfers has arisen because activities that result in the movement of navigable waters, such as trans-basin transfers of water to serve municipal, agricultural, and commercial needs, can also serve to move pollutants from one waterbody (donor water) to another (receiving water). The Supreme Court recently addressed this issue in South Fla. Water Mgmt. Dist. v. Miccosukee Tribe of Indians, 541 U.S. 95 (2004), leaving the matter unresolved.[2]

The precise legal question addressed here is whether the movement of pollutants from one navigable water to another by a water transfer is the "addition" of a pollutant potentially subjecting the activity to the permitting requirement under section 402 of the Act.[3] The

---

[2] In this case, the Supreme Court vacated a decision by the 11th Circuit, which had held that a Clean Water Act permit was required for transferring water from one navigable water into another, a Water Conservation Area in the Florida Everglades. The Court remanded the case for further fact-finding as to whether the two waters in question were "meaningfully distinct." If they were not, no permit would be required. The Court declined to address legal arguments made by the parties because the arguments had not been raised in the lower court proceedings. The Court noted that EPA had not spoken to these legal issues in an administrative document. 541 U.S. at 107.

[3] The Clean Water Act prohibits the discharge of a pollutant by any person except in compliance with specified statutory sections, including section 402. CWA § 301(a). The term "discharge of a pollutant" is defined as "any addition of any pollutant to navigable waters from any point source." CWA § 502(12). Discharges of pollutants other than dredged or fill material may be authorized by permits issued under section 402 by EPA or States with approved permitting programs. Discharges of dredged or fill material may be authorized by permits issued by the Army Corps of Engineers and authorized States under section 404, and that provision is not addressed or affected by this Agency interpretation.

question touches on the delicate balance created in the statute between protection of water quality to meet federal water quality goals, and the management of water quantity left by Congress in the hands of States and water resource management agencies. The issue also requires consideration of how the statute divides responsibility between the federal and State governments for controlling sources of water pollution. As a matter of longstanding Agency practice, EPA has not issued NPDES permits for mere water transfers; nor has it ever stated in any general policy or general guidance that an NPDES permit is required for such transfers.[4] However, to date, the Agency's position has not been fully articulated in an administrative documents.[5]

---

[4] The Agency has itself issued a permit on one occasion in response to the 1st Circuit's decision in Dubois v. U.S. Dep't. of Agric., 102 F.3d 1273 (1st Civ. 1996)(requiring a permit for a ski resort's snowmaking activities), discussed further below.

[5] The Supreme Court in Miccosukee noted that in an Office of General Counsel Opinion the Agency had reached the conclusion that irrigation ditches that discharge to navigable waters require NPDES permits even if they themselves qualify as navigable waters. 541 U.S. at 107. (citing In re Riverside Irrigation Dist. Op. No. 21, (EPA Off. Gen. Counsel, June 27, 1975), 1975 WL 23864. That opinion did not specifically address the question of whether an "addition" has occurred when a navigable water is merely conveyed to another navigable water. Instead, the specific issue that opinion addressed was whether "irrigation return flow [is] a properly permittable [point] source within the meaning of sections 301 and 402 of the [Clean Water] Act." Riverside, 1975 WL 231864 at *1. While the opinion answered that question in the affirmative, amendments to the Clean Water Act in 1977 and EPA's implementing regulations have exempted "return flows from irrigated agriculture" from regulation under the CWA. CWA § 402(1)(1)("The Administrator shall not require a permit under this section for discharges composed entirely of return flows from irrigated agriculture."); CWA § 502(14)("This term [point source] does not include agricultural stormwater discharges and return flows from irrigated agriculture."); and 40 CFR § 122.3(f)("Return flows from irrigated agriculture" are excluded from NPDES program.). To the

Based on the statute as a whole, we confirm the Agency's longstanding practice and conclude that Congress intended for water transfers to be subject to oversight by water resource management agencies and State non-NPDES authorities, rather than the permitting program under section 402 of the CWA. Furthermore, the Agency intends to initiate a rulemaking process to address water transfers.

Because Congress did not generally intend for the NPDES program to regulate water transfers, a factual, case-specific inquiry into whether a particular water transfer constitutes an "addition" is not required. If, however, EPA were required, for example in a judicial proceeding, to make a factual determination as to whether a waterbody is "meaningfully distinct" under the Supreme Court's decision in Miccosukee, section V below, discusses relevant factors that the Agency would consider.

This Agency interpretation is organized as follows. Section II discusses relevant factual background; section III analyzes the language, structure and legislative history of the Clean Water Act; section IV discusses the relevant caselaw; section V describes factors that would be relevant in applying the term "meaningfully distinct" from the Miccosukee decision to a particular set of facts; section VI describes the scope of this interpretation; and section VII summarizes the Agency's conclusions.

II. Factual Background

Water transfers occur routinely and in many different contexts across the United States. Typically, water

---

extent the 1975 Opinion, In re Riverside Irrigation Dist., conflicts with this Agency interpretation with respect to water transfers, it is superseded.

is routed through tunnels, channels, and/or natural stream water features, and either pumped or passively directed for uses such as providing public water supply, irrigation, power generation, flood control, and environmental restoration. Water transfers can be relatively simple, moving a small quantity of water a short distance on the same stream, or very complex, transporting substantial quantities of water over long distances, across both political and basin boundaries. There are thousands of water transfers currently in place in the United States, including 16 major diversion projects in the western States alone, excluding numerous projects in California. Examples of large surface water to surface water transfer projects include the Colorado-Big Thompson Project in Colorado and the Central Valley Project in California.

Water transfers are administered by various federal, State, and local agencies and other entities. The Bureau of Reclamation administers significant transfers in western States to provide approximately 140,000 farmers with irrigation water. With the use of water transfers, the Army Corps of Engineers keeps thousands of acres of agricultural and urban land in southern Florida from flooding in former areas of Everglades wetlands. Many large cities in the west and the east would not have adequate sources of water for their citizens were it not for the continuous redirection of water from outside basins. For example, both the cities of New York and Los Angeles are dependent on water transfers from distant watersheds to meet their municipal demand. In short, numerous States, localities, and residents are dependent upon water transfers and these transfers are an integral component of U.S. infrastructure.

Although there have been a few isolated instances where water transfers have been issued NPDES permits, we are aware of only one State that has a practice of issuing

NPDES permits for water transfers.[6] Although water transfers are not generally subject to section 402 of the Clean Water Act, the Act reserves the ability of states to regulate water transfers under State law. See CWA § 510.

III. Congress Intended to Leave Oversight of Water Transfer to Water Resource Management Agencies and State Non-NPDES Authorities Instead of the NPDES Program

Statutory construction principles instruct that the Clean Water Act should be interpreted by analyzing the statute as a whole. United State v. Boisdore's Heirs, 49 U.S. 113, 122 (1850). The Supreme Court has long explained "in expounding a statute, we must not be guided by a single sentence or member of a sentence, but look to the provisions of the whole law, and its object and policy." Id.[7] In general, the "whole statute" interpretation analysis means that "a statute is passed as a whole and not in parts or sections and is not animated by one general purpose and intent. Consequently, each part or section should be construed in connection with every other part or section so as to produce a harmonious whole." Norman J. Singer, Statutes and Statutory Construction vol. 2A § 46:05, 154 (6th ed., West Group 2000). As the Second Circuit has explained with regard to the CWA:

---

[6] Pennsylvania began issuing permits for water transfers in 1986, in response to a State court decision mandating the issuance of such permits. DELAWARE Unlimited v. DER, 508 A.2d 348 (Pa. Cmwlth, 1986).

[7] *See also,* Gustafond v. Alloyd Co., Inc., 513 U.S. 561, 570 (1995), Smith v. United States, 508 U.S. 223, 233 (1993), United States Nat'l Bank of Or. v. Independent Ins. Agents of Am., Inc., 508 U.S. 439, 455 (1993).

> Although the canons of statutory interpretation provide a court with numerous avenues for supplementing and narrowing the possible meaning of ambiguous text, most helpful to our interpretation of the CWA in this case are two rules. First, when determining which reasonable meaning should prevail, the text should be placed in the context of the entire statutory structure [quoting United States v. Dauray, 215 F.3d 257, 262 (2d Cir. 2000)]. Second, 'absurd results are to be avoided and internal inconsistencies in the statute must be dealt with.' United States v. Turkette, 452 U.S. 576, 580 (1981).

Natural Res. Council v. Muszynsici, 268 F.3d 91, 98 (2d Cir. 2001). See also, Singer, vol. 3B § 77:4, at 256-258.

A holistic approach is needed here in particular because the heart of this matter is the balance Congress created between federal and state oversight of activities affecting the nation's waters. The purpose of the CWA is to protect water quality. Congress nonetheless recognized that programs already existed at the State and local levels for managing water quantity, and it recognized the delicate relationship between the CWA and state and local programs. Looking at the statute as a whole is necessary to ensure that the analysis here is consonant with Congress' overall policies and objectives in the management and regulation of the nation's water resources.

We address below in turn the statutory language and structure, the legislative history, and the relevant caselaw.

A. Statutory Language and Structure

While no one provision of the Act expressly addresses whether water transfers are subject to the NPDES program, the specific statutory provisions addressing the management of water resources - coupled with the overall statutory structure – support the conclusion that Congress did not intend for water transfers to be regulated under section 402. The Act establishes a variety of programs and regulatory initiatives in addition to the NPDES permitting program. It also recognizes that the States have primary responsibilities with respect to the "development and use (including restoration, preservation, and enhancement) of land and water resources." CWA § 101(b). The Clean Water Act expresses the understanding that, as a general matter, water control facilities that merely transport "the waters of the United States" to where they can be most beneficially used are not subject to the NPDES regime.

Congress also made clear that the Clean Water Act is to be construed in a manner that does not unduly interfere with the ability of States to allocate water within their boundaries, stating:

> It is the policy of Congress that the authority of each State to allocate quantities of water within its jurisdiction shall not be superseded, abrogated or otherwise impaired by [the Act]. It is the further policy of Congress that nothing in this chapter shall be construed to supersede or abrogate rights to quantities of water which have been established by any State. Federal agencies shall co-operate with State and local agencies to develop comprehensive solutions to prevent, reduce and eliminate pollution in concert with programs for managing water sources.

CWA § 101(g). While section 101(g) does not prohibit EPA and States from taking actions under the CWA that they determine are needed to protect water quality,[8] it nonetheless establishes Congress' general direction against unnecessary Federal interference with State allocations of water rights. Water transfers are an essential component of the nation's infrastructure for delivering water that users are entitled to receive under State law. Because subjecting water transfers to a federal permitting scheme could unnecessarily interfere with State decisions on allocations of water rights, this section provides additional support for the Agency's interpretation that, absent clear Congressional intent to the contrary, it is reasonable to read the statute as not requiring NPDES permits for water transfers. See United States v. Bass, 404 U.S. 336, 349 (1971)("unless Congress conveys its purpose clearly, it will not be deemed to have significantly changed the federal-state balance.")

> A second statutory provision, section 510(2), similarly provides:
>
> Except as expressly provided in this Act, nothing in this Act shall . . . be construed as impairing or in any manner affecting any right or jurisdiction of the States with respect to the waters (including boundary waters) of such States.

Like section 101(g), this provision supports the notion that Congress did not intend administration of the CWA to unduly interfere with water resource allocation.

---

[8] PUD No. 1 of Jefferson County. v. Wash. State Dep't. of Ecology, 511 U.S. 700, 720 (1994)("Sections 101(g) and 510(2) preserve the authority of each State to allocate water quantity as between users; they do not limit the scope of water pollution controls that may be imposed on users who have obtained, pursuant to state law, a water allocation.").

Finally, one section of the Act – 304(f) – expressly addresses water management activities. This section directed EPA to issue guidelines for identifying and evaluating the nature and extent of nonpoint sources of pollutants,[9] as well as processes, procedures and methods to control pollution from, among other things, "changes in the *movement, flow or circulation of any navigable waters or ground waters*, including changes caused by the construction of dams, levees, channels, causeways, or flow diversion facilities." CWA 304(f)(2)(F) (emphasis added). While section 304(f) does not exclusively address nonpoint sources of pollution,[10] it nonetheless "concerns nonpoint sources" (Miccosukee, 541 U.S. at 106) and reflects an understanding by Congress that water movement could result in pollution, and that such pollution would be managed by States under their nonpoint source program authorities, rather than the NPDES program. This interpretation accords with the direction to EPA and other federal agencies in section 101(g) to work with State and local agencies to develop "comprehensive solutions" to

---

[9] Sources not regulated under sections 402 or 404 are generically referred to as "nonpoint sources." See National Wildlife Fed'n v. Consumers Power Co. 862 F.2d 580, 582 (6th Cir. 1988) ("'nonpoint source' is shorthand for and 'includes all water quality problems not subject to § 402'")(quoting National Wildlife Fed'n v. Gorsuch, 693 F.2d 156,166) (D.C. Cir. 1982)(internal quotation marks omitted)).

[10] Mere mention of an activity in section 304(f) does not mean it is exclusively nonpoint source in nature. See Miccosukee at 106 (noting that section 304(f)(2)(F) does not explicitly exempt nonpoint sources if they also fall within the definition of point source). Nonetheless, section 304(f) is focused primarily on addressing pollution sources outside the scope of the NPDES program. See H.R. Rep. No. 92-911, at 109 (1972), reprinted in Legislative History of the Water Pollution Control Act Amendments of 1972, Vol. 1 at 796 (Comm. Print 1973)("[t]his section . . . on . . . nonpoint sources is among the most important in the 1972 Amendments")(emphasis added)).

water pollution problems "in concert with programs for managing water resources."

Thus, these sections of the Act together demonstrate that Congress was aware that there might be pollution associated with water management activities, but chose to defer to comprehensive solutions developed by State and local agencies for controlling such pollution. Because the NPDES program only focuses on water pollution from point source discharges, it is not the kind of comprehensive program that Congress believed was best suited to addressing pollution that may be associated with water resource management.

In contrast with these provisions of the statute which expressly address water management activities, the general prohibition and definition sections of the statute do not explicitly discuss water management. Section 301(a) of the Act proscribes "the discharge of any pollutant by any person" except in compliance with specified sections of the CWA, including section 402. "Discharge of a pollutant" is defined as "any addition of any pollutant to navigable waters from any point source." CWA § 502(12). While the statute does not define "addition," sections 101(g), 102(b), 304(f) and 510(2) provide a strong indication that the term "addition" should be interpreted in accordance with those more specific sections of the statute. In light of Congress' clearly expressed policy not to unnecessarily interfere with water resource allocation and its discussion of changes in the movement, flow or circulation of any navigable waters as sources of pollutants that would not be subject to regulation under section 402, it is reasonable to interpret "addition" as not generally including the mere transfer of navigable waters.

The overall structure of the statute further supports this conclusion. In several important ways, water transfers are unlike the types of discharges that were the primary

focus of Congressional attention in 1972. Discharges of pollutants covered by section 402 are subject to "effluent" limitations. Water transfers, however, are not like effluent from an industrial, commercial or municipal operation. Rather than discharge effluent, water transfers release one navigable water into another. There is no indication that Congress intended to subject the navigable waters themselves to effluent limitations.

Congress also recognized that the operators of water control facilities are frequently not responsible for the presence of pollutants in the waters they transport. Rather, those pollutants often enter "the waters of the United States" through point and nonpoint sources located far from those facilities and beyond control of the project operators. Congress properly envisioned that the project operators should not be saddled with curing those regional water quality problems through the Clean Water Act's NPDES permitting regime. Indeed, Congress generally intended that pollutants be controlled at the source whenever possible. See S. Rep. No. 92-414, p. 77 (1972) (justifying the broad definition of navigable waters because it is "essential that discharge of pollutants be controlled at the source").[11] Rather, those problems are more sensibly addressed through water resource planning and land use regulations, which attack the problem at its source. See, e.g., CWA § 102(b) (reservoir planning); CWA § 208(b)(2)(F) (land use planning to reduce agricultural nonpoint sources of pollution); CWA § 319 (nonpoint source management programs); and CWA § 401 (state certification of federally licensed projects).

---

[11] Recognition of a general intent to control pollutants at the source does not mean that dischargers are responsible only for pollutants that they generate; rather, point sources need only convey pollutants into navigable waters to be subject to the Act. See Miccosukee at 105. Municipal separate storm sewer systems, for example, are clearly subject to regulation under the Act. CWA § 402(p).

The Agency, therefore, concludes that, taken as a whole, the statutory language and structure of the Clean Water Act indicate that Congress did not generally intend to subject water transfers to the NPDES program, Rather, Congress intended to leave oversight of water transfers to water resource management agencies and the States.

B. Legislative History

The legislative history of the Clean Water Act also supports this conclusion. First, the legislative history of section 101(g) reveals that "[i]t is the purpose of this [provision] to insure that State [water] allocation systems are not subverted." 3 Congressional Research Serv., U.S. Library of Congress, Serial No. 95-14, A Legislative History of the Clean Water Act of 1977, at 532 (1978); see PUD No. 1 of Jefferson County v. Washington Dep't of Ecology, 511 U.S. 700, 721 (1994).

Notably, the legislative history of the Act discusses water flow management activities only in the context of the nonpoint source program. In discussing section 304(f), the House Committee Report specifically mentioned water flow management as an area where EPA would provide technical guidance to States for their nonpoint source programs, rather than an area to be regulated under section 402.

> This section and the information on such nonpoint sources is among the most important in the 1972 Amendments. . . . The Committee, therefore, expects the Administrator to be most diligent in gathering and distribution of the guidelines for the identification of nonpoint sources and the information on processes, procedures, and methods for control of pollution from such nonpoint sources as . . . natural and manmade changes in the normal flow of surface and ground waters.

H.R. Rep. No. 92-911, at 109 (1972)(emphasis added).

In the legislative history of section 208 of the Act, the House Committee report noted that in some States, water resource management agencies allocating stream flows are required to consider water quality impacts. The Report stated:

> [I]n some States water resource development agencies are responsible for allocation of stream flow and are required to give full consideration to the effects on water quality. To avoid duplication, the Committee believes that a State which has an approved program for the handling of permits under section 402, and which has a program for water resource allocation should continue to exercise the primary responsibility in both of these areas and thus provide a balanced management control system."

H.R. Rep. No. 92-911, at 96 (1972).

Thus, Congress recognized that water resource management agencies were already addressing water quality issues associated with water resources management. While the new section 402 permitting program would now also have responsibility for addressing water quality issues, Congress did not indicate that it intended a wholesale transfer of responsibility away from water resource agencies for overseeing water transfers to the NPDES authority. Indeed, such a result would have been directly contrary to its desire for authority to remain at the State level, because NPDES authority was initially vested in EPA. Rather, Congress encouraged States to obtain approval of authority to administer the NPDES program under section 402(b) so that the NPDES program could work in concert with

water resource agencies' oversight of water management activities to ensure a "balanced management control system." Id.

C. Conclusion

In sum, the language, structure, and legislative history of the statute all support the conclusion that Congress did not intend to subject water transfers to the NPDES program. Water transfers are an integral part of water resource management; they embody how States and resource agencies manage the nation's water resources and balance competing needs for water. Water transfers also physically implement State regimes for allocating water rights, many of which existed long before enactment of the Clean Water Act. Congress was aware of those regimes, and did not want to impair the ability of these agencies to carry them out. Finding the NPDES program generally inapplicable to water transfers is true to this intent and the structure of the Clean Water Act, and gives meaning to sections 101(g) and 304(f) of the Act.

Thus, we reject the view that Congress intended in 1972 to subject water transfers to an entirely new federal regulatory regime imposing effluent limitations envisioned principally for industrial and municipal discharges. That interpretation runs directly counter to Congress's recognition of the need for balanced and comprehensive approach to the allocation of water resources and ignores the statutory scheme that emphasizes control of pollutants at their source where possible.

IV. Caselaw

Several judicial decisions have addressed whether dams, hydropower facilities and water transfers are subject to the NPDES permitting requirement. In general, there

have been two lines of cases. One line of cases (the dams cases) has addressed whether dams and hydropower facilities are subject to the NPDES program. See National Wildlife Fed'n v. Gorsuch, 693 F.2d 156 (D.C.Cir. 1982) and National Wildlife Fed'n v. Consumers Power Co., 862 F.2d 580 (6th Cir. 1988). These cases have held that such facilities do not "add" pollutants and therefore are not subject to section 402 permit requirements. In two other cases (the water pumping cases), appellate courts have addressed whether the pumping of water between two different navigable waters required NPDES permits. Dubois v. U.S. Dep't. of Agric., 102 F.3d 1273 (1st Cir. 1996); Catskill Mountains Chanter of Trout Unlimited v. City of New York, 273 F.3d 481 (2d Cir. 2001). In these cases, the courts held that a permit was required.

The two lines of cases took fundamentally different analytical approaches to construing the statute. In the dams cases, the courts adopted an approach similar to that articulated in this interpretation, looking to the CWA as a whole to discern Congressional intent. The water pumping cases, in contrast, were premised solely on the definition of "discharge of a pollutant" in section 502(12) and general statutory purposes. Application of this narrow approach here is undercut by the Supreme Court's analysis in Miccosukee. Furthermore, for the reasons discussed above, it is our view that the analysis applied in the dams cases, determining Congressional intent based on the CWA as a whole, is more appropriate here.

A. The Dams Cases

EPA's longstanding position has been that dams and hydropower facilities do not "add" pollutants when they are merely moving water from one location to another

within the same waterbody.[12] In Gorsuch, the plaintiff National Wildlife Federation brought suit seeking a declaration that water quality changes caused by dams – low dissolved oxygen, dissolved minerals and nutrients, sediment, temperature changes and supersaturation – required NPDES permits. While acknowledging that dams contributed to these water quality issues, EPA argued that no permit was required because the impoundment and diversion of water through the dam did not physically introduce a pollutant from the outside world into navigable waters.

The Gorsuch court concluded that Congress had not spoken to the precise question of whether dams required NPDES permits, and upheld EPA's interpretation as reasonable, noting that "[t]hroughout its consideration of the Act, Congress' focus was on traditional industrial and municipal wastes; it never considered how to regulate facilities such as dams which . . . convey . . . polluted waters downstream." 693 F.2d at 175.

In upholding EPA's interpretation, the Gorsuch court recognized the importance of the NPDES program in the overall CWA regulatory scheme, but noted that Congress chose not to require NPDES permits in all circumstances. Id. at 176. Indeed, the court acknowledged that Congress also expressly chose to allow States to address certain pollution problems through areawide waste management plans under section 208 of the statute. The court also noted that several provisions of the statute that

---

[12] Where water diversion facilities, such as dams, add pollutants such as oil and grease from machinery operations to water passing through the diversion structure into the downstream water, NPDES permits are required. Consumers Power, 862 F.2d at 588; Gorsuch, 693 F.2d at 165, n. 22. Nothing in this Agency interpretation affects EPA's longstanding approach to regulation of such discharges under section 402.

relate specifically to water diversion facilities, including section 304(f), supported EPA's position.

While noting the strong environmental goals expressed in section 101 of the CWA, the court highlighted that Congress "did not want to interfere any more than necessary with state water management, of which dams are an important component." Id. at 178-79. "In light of its intent to minimize federal control over state decisions on water quantity," the Court noted that "Congress might also, if confronted with the issue, have decided to leave control of dams insofar as they affect water quality to the states." Id. at 178-79 (emphasis in original). Citing the Act's legislative history, the Court concluded that "[s]uch a policy would reduce federal/state friction and would permit States to develop integrated water management plans that address both quantity and quality." Id. at 179, (citing H.R. Rep. No. 92-911, at 96 (1972)).

The Gorsuch court also noted several policy considerations that supported the reasonableness of EPA's decision not to require NPDES permits for dams, including: (1) that dam-caused pollution depends partly on whether other sources have polluted the water upstream, greatly complicating the issuance of nationally uniform standards; (2) dams are a major component of State water management activities, providing irrigation, drinking water, and flood protection, complexities that "the NPDES program was not designed to handle, it may be that state areawide water quality plans are the better regulatory tool." Gorsuch, 693 F.2d at 182.

Finally, the court noted that if dam-caused pollution was "truly of major proportions," EPA or environmental organizations "would most likely have brought it to Congress' attention , either in 1972 or in 1977" and that "[u]nless and until Congress addresses the matter," the

court could not say that EPA was required to regulate dams under section 402. Id. at 183.

In the second leading dam case, Consumers Power, the 6th Circuit addressed the similar question of whether a hydropower facility that pumped water from Lake Michigan to a reservoir, and then released the water back to the lake to generate electricity, required an NPDES permit. In the course of the diversion, some fish that had been contained in the lake were entrained in the pumps, chopped up and then subsequently discharged back to the lake. The 6th Circuit agreed with Gorsuch and deferred to EPA's position that an NPDES permit was not required for the release of the dead fish by the hydropower facility into Lake Michigan. The court noted that "Congress apparently intended that pollution problems caused by dams and other flow diversion facilities are generally to be regulated by means other than the NPDES permit program," 862 F.2d at 587. Citing section 304(f)(2)(F) of the statute, the court concurred with the D.C. Circuit's view that "generally water quality changes caused by the existence of dams and other similar structures were intended by Congress to be regulated under the 'nonpoint source' category of pollution." Id. at 588. The court also declined to distinguish the hydropower facility in that case (which pumped water out of Lake Michigan), from other similar facilities or dams that sit in a stream bed and rely upon passive diversion of water, finding that whether facilities "involve a passive diversion, or pumped movement of water," the cases are fundamentally the same. Id. at 589.

These cases examined the CWA as a whole and concluded that it was more consistent with the overall statutory scheme to subject water flow diversions to State nonpoint planning processes rather than the NPDES program.

B. The Pumping Cases

Prior to Miccosukee, two other courts reached different conclusions based on a literal interpretation of the term "addition," holding that certain activities required NPDES permits.

In Dubois, the plaintiff claimed that the U.S. Forest Service should not have authorized the expansion of a ski facility because, among other reasons, the facility had failed to obtain an NPDES permit to pump water uphill from a river to a mountainside pond as part of its snowmaking operation. Based on EPA's position that a permit was not required for the transfer, the Forest Service argued that the water pumped from the river to the pond had not lost its status as a water of the U.S. and therefore pollutants were not introduced to the pond from the outside world. The Forest Service also pointed out that the pond drained into the river and therefore the pond and the river were hydrologically connected and of like quality. The 1st Circuit, however, concluded that the water from the river would never reach the pond "naturally" since the flow of water was downhill from the pond to the river, that water passed through the ski facility's privately owned pipes on its way to the pond, and that the two water bodies were not necessarily of like quality. Based upon these conclusions, the court held that the two waters were "distinct" and that introduction of pollutants by the pumping was an addition for which a permit was required.

In Catskill Mountain, the plaintiffs claimed that water pumped from a reservoir in upstate New York through a tunnel into a creek on its way to being used as drinking water for New York City required a permit. The court held that an "addition"" means the introduction of a pollutant from the outside world, but only "provided that 'outside world' is construed as any place outside the particular water body to which pollutants are added." 273 F.3d at 491. The 2nd Circuit characterized Gorsuch and Consumers Power as involving recirculation of water

within essentially the same waterbodies, and held that no permit was required there because nothing was being added to them. The court contrasted those cases with the facts before it, where water was pumped several miles to an otherwise unconnected body of water. On those facts, the court held that a permit was required.

These cases discerned Congressional intent solely based on one term in section 502(12) of the statute - "addition." To determine whether the pumps added pollutants to the navigable waters, the courts applied a dictionary understanding of the term "addition" as increasing the amount of pollutants in the receiving water. They determined that a permit was required because the transfer increased the amount of certain pollutants in the receiving waterbody that would not have occurred in the absence of the transfer.

While focusing solely on the term "addition" is one approach to interpreting the statute,[13] the better approach here, as discussed above, takes a holistic view and also gives meaning to those statutory provisions where Congress expressly considered the issue of water resource management, as well as Congress' overall division of responsibility between State and federal authorities under the statute.

However, even if the inquiry were narrowly limited to construing the term "addition" contained in section 502(12), the pumping cases' reasoning has been

---

[13] The government's amicus curiae brief before the Supreme Court in Miccosukee also focused on the term "addition." The brief reached a different result than the lower court decisions, in part, because it framed the equation differently - i.e., whether the pumping of water increased the sum of pollutants in the navigable waters as a whole, as opposed to the particular receiving water. See also infra note 14 and accompanying text.

significantly undercut by the Supreme Court's decision in Miccosukee, as discussed below.

C. The Supreme Court Decision in Miccosukee

In Miccosukee, the plaintiffs claimed that a permit was required for the pumping of water by the South Florida Water Management District from a canal (the C-11 canal) containing urban stormwater runoff, including phosphorus, through a pump (S-9 pump) into an undeveloped water conservation area (WCA-3). The district court granted summary judgment for the plaintiffs, finding that the C-11 canal and WCA-3 were two separate bodies of water of differing water quality and that water would not naturally flow from the canal into the conservation area. The 116 Circuit affirmed, finding that "but for" the pumping, water would not have flowed naturally from the canal into the conservation area. Therefore, the court found that the S-9 pump was the cause-in-fact of the discharge, and a permit was required. The Supreme Court granted the Management District's petition for certiorari.

After rejecting arguments by the petitioner that a discharger is liable only for pollutants that originate from the point source itself, the Court addressed arguments by the Management District and the United States that a permit was not required because navigable waters should be viewed unitarily for purposes of the NPDES permit requirement. Under this argument, mere conveyance of one navigable water into another did not add pollutants because they were already contained in the navigable waters, The Court noted that EPA had not articulated this position in any administrative documents and raised several concerns with the theory. 54I U.S. at 107.[14]

[14] The Court stated that the unitary waters theory could be viewed as inconsistent with statutory provisions focusing on protection of

Ultimately, the court declined to address the unitary waters theory, finding that the argument had not been raised below or articulated by the agency in any administrative context.

Finally, the Court addressed the parties' disputes about whether the C-I 1 canal and WCA-3 were hydrologically indistinguishable parts of a single water, as contended by the Management District and the United States, or two distinct waters. The Court noted certain facts supporting the view that the canal and conservation area were part of a single water, including significant seepage between the two, and the fact that they overlay the same porous aquifer. While the Court agreed with the lower courts' factual finding that water would not initially flow "naturally" into the WCA-3 if the pumps were turned off, the Court found that the lower courts had failed to consider the long-term effects of shutting down the pumps on the relationship between the waters, as well as other important facts. Finding that the district court had granted summary judgment prematurely without having resolved important factual questions, the Court remanded the case to the district court to determine whether the canal and the conservation areas were "meaningfully distinct water bodies." If they were not meaningfully distinct, then no permit would be required. Miccosukee, 541 U.S. at 112. The Court did not explain or define this term.

The Supreme Court's decision is relevant to this Agency interpretation in three respects. First and foremost, the Court expressly reserved judgment on the legal theory that applies in deciding whether the NPDES program

---

individual water bodies, and that the theory was potentially inconsistent with the NPDES regulations for intake credits, which regulate movement of water among waterbodies. 541 U.S. at 106-07. The present Agency interpretation reflects EPA's consideration of the Court's concerns.

applies to water transfers, noting that the Agency had not taken a position in an administrative context. By leaving the matter open, the Court essentially invited the Agency to speak to the broad legal issues in the first instance.

Second, the Supreme Court signaled that the statute needed to be construed in light of not only the language in sections 301(a) and 502(12), but also other provisions addressing management of water resources, in particular section 101(g). The Court stated, "It may be that construing the NPDES program to cover such transfers would . . . violate Congress' specific instruction that 'the authority of each State to allocate quantities of water within its jurisdiction shall not be superseded, abrogated or otherwise impaired' by the Act." Id. at 108 (citing section 101(g)). By not confining itself to interpreting solely the meaning of the term "addition," the Court's decision undercut the narrow analytical approach of the pumping cases.

Third, the Supreme Court undercut the reasoning of Catskill Mountain and Dubois by taking a broader approach to evaluating the relationship between two waters than was taken in those decisions. The Court in Miccosukee recognized that the pumping was uphill: "The District Court certainly was correct to characterize the flow through the S-9 pump station as a nonnatural one, propelled as it is by diesel-fired motors against the pull of gravity." Id. at 111. In the Court's view, however, this fact was not dispositive. Rather, the Court looked more broadly to other factors, such as seepage between the waters and the long-term effects if pumping were ceased. Thus, the Court's decision casts significant doubt on the validity of simplistically applying a "but for/natural flow" test followed by the appellate courts in the pumping cases and instead calls for a broader evaluation of the relationship between waters.

V. Any Application of the Term "Meaningfully Distinct" Should Reflect Congressional Intent

While the Agency believes Congress intended to leave the oversight of water transfers to water resource management agencies and the States, if EPA were required, for example in a judicial proceeding, to make a factual determination as to whether a waterbody is "meaningfully distinct," the Agency would construe this term in light of Congressional intent. The following factors would be relevant to applying this term in a particular case.

The term "meaningfully distinct" suggests a two-part test for deciding whether a water transfer might constitute an addition: (1) the waters must be distinct, and (2) the distinction between them must be meaningful. We address these steps in turn.

First, to determine whether waters are distinct, the full range of hydrologic connections should be considered, both natural and man-made. The nation's waters have been extensively altered by human activity for centuries, in some cases drastically so. In some areas of the country, vast networks for delivery of water have been created. In some cases, waters that were historically one waterbody have been separated into smaller water segments. Some, once created, continue to operate via the natural force of gravity, while others involve a combination of human-caused diversions, pumps and flow controls along with natural forces. Given these extensive modifications, in many cases longstanding, it can be difficult to distinguish "natural" from human-induced water flows. Considering the full range of hydrologic connections is appropriate in light of how broadly the Supreme Court was willing to look at the relationship between the waterbodies in Miccosukee. Moreover, Congress recognized in the CWA that both natural and man-made activities have altered the

hydrologic landscape. See, e.g., H.R. Rep. No. 92-911, at 109 (1972)(discussing EPA's duty under section 304(f) of the statute to provide guidance to States on "natural and manmade changes in the normal flow or surface and ground waters")(emphasis added). Finally, under the CWA, it has long been accepted that the statute applies to all waters that meet the statutory and regulatory definitions of navigable waters, regardless of whether human activity may have contributed to making the water what it is today. Leslie Salt Co. v. U.S, 896 F.2d 354 (9'' Cir. 1990). It is consistent with that principle to consider both natural and manmade hydrologic features in deciding whether waters are distinct.

Thus, where two waters have been or are hydrologically connected, through human activity or otherwise, this factor strongly supports the conclusion that they are not "distinct." In some cases, the waters may have a history of having been integrated or they may have become integrated through natural changes or human activity over time. In either case, the connection has integrated the waters and they are logically not "distinct"

Nor would it be logical to conclude that waters are distinct where they have been connected by a conveyance that happens to move the water uphill via a pump as opposed to water moving downhill via gravity. The critical question is whether the waters are distinct. This question was squarely addressed by the 6th Circuit in Consumers Power, where the plaintiffs alleged the case was distinguishable from the dam at issue in Gorsuch because the facility was not located in the streambed, but rather required water to be pumped uphill into a holding reservoir as part of the operation. The court disagreed that this distinction mattered: "[Hydro-electric power facilities, whether they ... involve a passive diversion, or pumped movement of water, are fundamentally the same...." 862 F.2d at 589. The decision in Miccosukee also implicitly

rejected the notion that simply having to move water uphill meant that waters were distinct, since the Court did not fund that fact to be dispositive.

Because the full breadth of the historical and ongoing hydrological conditions would be relevant to deciding whether waters are distinct, it would not make sense to ignore, as have some of the appellate court decisions, the water transfer itself in deciding whether two waters are distinct. In some cases, as in the case of the S-9 pump, the transfers have been going on for decades and even predate enactment of the CWA Such connections have been as much a part of the hydrological landscape as naturally created ones and, over time, may be difficult to distinguish from the "natural" hydrologic regime, Where two navigable waters are connected by a water transfer, they have become closely intertwined in the hydrological landscape and may even be considered part of the same tributary system. The length of time that the connection has been in place could be relevant to determining whether the waters are distinct.

If waters are distinct, the next question under the Supreme Court's decision is whether the distinction between the waters is "meaningful." Again, the Supreme Court's decision does not provide any guidance for interpreting this term. However, the fact that the Supreme Court indicated that there must be a "meaningful" distinction suggests that it is not sufficient for the waters simply to be distinct to potentially trigger the permitting requirement. Rather, over and above any hydrologic distinction between the waters, a distinction must rise to the level of being "meaningful" in order to potentially require an NPDES permit.

In the absence of specific guidance by the Supreme Court, the term "meaningfully" should be applied in light

of Congressional intent to both protect water quality[15] and rely on States and water resource management for oversight of water transfers. In this context, a "meaningful" distinction would refer to transfers that would have a meaningful, or significant, adverse effect on water quality that is not being adequately addressed by States and water resource management agencies. Thus, it would be appropriate to consider in the first instance whether there are exiting laws, regulations or programs that are being implemented that adequately address the types of water quality concerns associated with the water transfer at issue.[16] The States retain full sovereign authority to regulate water quality within their jurisdiction, see CWA § 510, and the States have independent authority to prevent the pollution of the state's waters and to protect human health and wildlife, including aquatic life. For

---

[15] In this Agency interpretation "water quality" includes physical, chemical and biological integrity.

[16] An example of an existing federal law, is the Comprehensive Everglades Restoration Plan (CERP), Pub. L. No.106-541, § 601, 114 Stat. 2754 (2000), under which Congress authorized a comprehensive plan within the defined South Florida Ecosystem "for modifications and operational changes to the Central and Southern Florida Project that are needed to restore, preserve, and protect the South Florida Ecosystem while providing for other water-related needs of the region, including water supply and flood protection." § 601(b)(1)(A). Congress mandated that "the Plan shall be implemented to ensure the protection of water quality," 4, by requiring the Secretary of the Army to consider applicable state water quality standards and "include such features as the Secretary determines are necessary to ensure that all ground water and surface water discharges from any project feature authorized by this subsection will meet all applicable water quality standards and applicable water quality permitting requirements." § 601(b)(2)(A)(ii). CERP specifically includes water storage, water transfer and water treatment projects within the Congressional authorization.

example, many State laws addressing water diversions expressly authorize consideration of water quality impacts. In addition, where a water transfer is of environmental concern due to nonpoint source contributions to the donor water, the State may have authorities under its nonpoint source program to address the problem. Where such authorities are being adequately implemented, it would be consistent with Congressional intent to defer to them.[17]

Where authorities are not being implemented to address the water quality concerns, we believe other factors would be relevant to determining whether there is a "meaningful" distinction between waters. It would be logical to inquire first into the degree of similarity or differences between the waters. The differences in the chemical, physical and biological characteristics should be significant in order to be considered meaningful. Merely because two waterbodies may be dissimilar does not mean, however, that any transfer between them would be environmentally meaningful within the context of the CWA. Rather, the specific context of the transfer should be evaluated to determine whether the transfer would have a substantial adverse impact on the receiving waterbody.

---

[17] While an NPDES permit may not be required for a particular water transfer, existing NPDES and water quality standards regulations still can *ensure* protection of receiving waters. Point source dischargers to the donor waterbody will need to have limits as stringent as necessary to meet the water quality requirements of all affected States, which would include the applicable water quality standards in the "downstream" receiving water. 40 C.F.R. § 122.4(d). Further, in designating uses of the upstream water and the appropriate criteria for that water, "the State shall take into consideration the water quality standards of downstream waters and shall ensure that its water quality standards provide for the attainment and maintenance of the water quality standards of downstream waters." 40 C.F.R. § 131.10(b)(emphasis added). A waterbody receiving a water transfer would be a "downstream" water for purposes of these regulations.

VI. Scope of this Agency Interpretation

This Agency interpretation addresses only water transfers - that is, activities that convey or connect navigable waters without subjecting the water to intervening industrial, municipal or commercial use.[18] It does not address any other activities, or any jurisdictional terms under the statute other than "addition."[19]

For example, this interpretation does not affect EPA's longstanding position that, if water is withdrawn from navigable waters for an intervening industrial, municipal or commercial use, the reintroduction of the intake water and associated pollutants is an "addition" subject to NPDES permitting requirements. EPA has long imposed NPDES requirements on entities that withdraw process water or cooling water and then return some or all of the water through a point source. See., e.g., 40 C.F.R. § 122.2 (definition of process wastewater); 40 C.F.R. §§ 125.80-125.89 (regulation of cooling towers); 40 C.F.R. § 122.45(g) (regulations governing intake pollutants for technology-based permitting); 40 C.F.R. Part 132, Appendix F, Procedure 5-D (containing regulations governing water quality-based permitting for intake pollutants in the Great Lakes). Conversely, waters that are

---

[18] We emphasize, for purposes of clarity, that a water transfer occurs between two 'waters of the United States." Accordingly, the movement of water through a dam is not a water transfer because the dam merely conveys water from one location to another within the same waterbody (although the movement of water through a dam also does not require an NPDES permit because no "addition" has occurred). Moreover, a discharge from a waste treatment system, for example, which by definition is not a water of the United States, to a water of the United States, would not constitute a water transfer (and would require an NPDES permit). See 40 C.F.R. § 122.2.

[19] Thus, this interpretation does not address the meaning of the terms, "point source," "pollutant" or "navigable waters."

diverted and used for irrigation and then reintroduced to the navigable waters are exempt from permitting requirements under the exemption for return flows from irrigated agriculture from the definition of "point source" in section 502(14) and this Agency interpretation does not affect that exemption.

The activities addressed by this Agency interpretation also stand in sharp contrast to other activities that have long been subject to the Clean Water Act's permitting requirements. For example, section 402 subjects placer mining of ore deposits in streams and rivers to the NPDES permitting program because the process results in the excavation and point source discharge of dirt and gravel into navigable waters. See Rybachek v. EPA 904 F.2d 1276, 1285 (9th Cir. 1990). Similarly, section 404 of the Clean Water Act subjects the deposit or redeposit of dredged or fill material to a specialized permitting program because that activity results in the point source discharge of those materials into navigable waters. CWA § 404; United State v. Deaton, 209 F.3d 331, 335-336 (4th Cir. 2000); United States v. M.C.C. of Fla., Inc., 772 F.2d 1501, 1503-1506 (11th Cir. 1985), vacated on other grounds, 481 U.S. 1034 (1987), readopted in relevant part, 848 F.2d 1133 (11th Cir. 1988); Avoyelles Sportsmen's League. Inc, v. Marsh, 715 F.2d 897, 923-925 (5th Cir. 1983). The Clean Water Act also clearly imposes permitting requirements on publicly owned treatment works, and large and medium municipal separate storm sewer systems. See CWA §§ 4O2(a), 402(p)(1)-(4). Congress amended the Clean Water Act in 1987 specifically to add new section 4O2(p) to better regulate storm water discharges from point sources. Water Quality Act of 1987, Pub. L No. 100-4, 101 Stan 7 (1987).

Again, this interpretation does not affect EPA's longstanding regulation of such discharges.[20]

VII. Conclusion

For the reasons explained above, based on the CWA as a whole, the Agency concludes that Congress intended to leave the oversight of water transfers to authorities other than the NPDES program. While resort to a case-specific evaluation of waters is not necessary or appropriate in light of Congressional intent, if such an evaluation were determined to be needed, a permit would not be required for waters that are not "meaningfully distinct" and that term should be construed in light of the water quality goals of the statute and Congressional intent to rely on non-NPDES authorities for overseeing water management activities. Finally, the Agency intends to initiate a rulemaking process to address water transfers.

---

[20]This Agency interpretation also does not change EPA's longstanding position, upheld by the Supreme Court in Miccosukee, that the definition of "discharge of a pollutant" in the CWA includes coverage of point sources that do not themselves generate pollutants. The Supreme Court stated, "A point source is, by definition, a 'discernible, confined, and discrete conveyance' § 1362(14) (emphasis added). That definition makes plain that a point source need not be the original source of the pollutant; it need only convey the pollutant to navigable waters,' which are, in turn, defined as 'the waters of the United States.' § 1362(7)." Miccosukee, 541 U.S. at 105.

(2)

No. 06-729

FILED

JAN 2 4 2007

OFFICE OF THE CLERK
SUPREME COURT, U.S.

In the

Supreme Court of the United States

CITY OF NEW YORK, NEW YORK CITY DEPARTMENT OF ENVIRONMENTAL PROTECTION, and JOEL A. MIELE, SR., Commissioner of Department of Environmental Protection.

Petitioners,

- v.-

CATSKILL MOUNTAINS CHAPTER OF TROUT UNLIMITED, INC., THEODORE GORDON FLYFISHERS, INC., CATSKILL-DELAWARE NATURAL WATER ALLIANCE, INC., FEDERATED SPORTSMEN'S CLUBS OF ULSTER COUNTY, INC., RIVERKEEPER, INC., STATE OF NEW YORK, NEW YORK STATE DEPARTMENT OF ENVIRONMENTAL CONSERVATION, and ERIN M. CROTTY, Commissioner of the New York State Department of Environmental Conservation,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF FOR CERTAIN RESPONDENTS IN OPPOSITION

KARL S. COPLAN
Counsel of Record
DANIEL E. ESTRIN
PACE ENVIRONMENTAL LITIGATION CLINIC, INC.
Attorneys for Catskill Mountains Chapter of Trout Unlimited, Inc., Theodore Gordon Flyfishers, Inc., Catskill-Delaware Natural Water Alliance, Inc., Federated Sportsmen's Clubs of Ulster County, Inc., and Riverkeeper, Inc.
78 North Broadway
White Plains, New York 10603
(914) 422-4343

January 24, 2007

DICK BAILEY SERVICE (212) 608-7666 (718) 522-4363 (516) 222-2470 (914) 682-0848 Fax (718) 522-4024
1-800-531-2028

QUESTION PRESENTED

Whether the conveyance of water containing pollutants from one watershed, through a tunnel underneath a mountain range into higher quality waters of a trout fishery in a separate and distinct watershed, causing a violation of State-established water quality standards, constitutes an addition of a pollutant from a point source under Section 301 of the Clean Water Act, 33 U.S.C. §1311.

TABLE OF CONTENTS

Pages

OPINIONS BELOW.....1

JURISDICTION.....1

STATEMENT.....1

ARGUMENT.....8

I. THERE IS NO SPLIT IN THE CIRCUITS, AS EVERY CIRCUIT TO CONSIDER THE ISSUE HAS AGREED THAT INTER-BASIN TRANSFERS OF POLLUTED WATER ARE SUBJECT TO CLEAN WATER ACT § 301.....8

A. Every court has reached the same conclusion that inter-basin transfers of polluted water require a CWA permit.....8

B. The decision below is entirely consistent with this Court's remand in *Miccosukee*.....10

II. THE COURT'S INTERVENTION IS BOTH UNTIMELY AND UNWARRANTED IN LIGHT OF THE EPA'S PENDING RULEMAKING.....11

A. Granting certiorari would not finally resolve the issue given the pendency of EPA's rulemaking.....12

B. It is inappropriate for the Court to consider the final rule on this record.....13

C. There is no reason to hold for the final rule.....14

Pages

III. THE DECISION BELOW IS CORRECT.....16

A. The Second Circuit's unanimous holding applies the plain language of the Clean Water Act.....16

B. This is not a "unitary waters" case.....18

C. Petitioners' reliance on *Gorsuch* and *Consumers Power* is misplaced.....20

IV. THE REQUIREMENT OF A CWA PERMIT DOES NOT UNDULY BURDEN NEW YORK CITY'S ABILITY TO TRANSFER WATER.....21

A. The Supreme Court held that CWA § 101(g) presumes legitimate regulation of water quality.....21

B. New York City conceded that a SPDES permit allows for flexibility.....22

V. THE EPA'S PROPOSED RULE IS NOT ENTITLED TO DEFERENCE.....24

CONCLUSION.....25

EXHIBITS.....26

A. *Selected pages from* Plaintiffs' Statement of Material Facts in Support of their Motion for Partial Summary Judgment, dated March 13, 2002, and Defendants' corresponding response, dated April 18, 2002.....27

Pages

B. Photograph taken October 7, 2002 immediately downstream from the Shandaken Tunnel Outlet.....35

C. Photograph taken October 7, 2002 immediately upstream from the Shandaken Tunnel Outlet.....36

TABLE OF AUTHORITIES

Cases

Page

Bowen v. Georgetown University Hospital, 488 U.S. 204 (1988) 15

Catskill Mountains Chapter of Trout Unlimited, Inc. v. City of New York, 273 F.3d 481 (2d Cir. 2001) ..... *passim*

Catskill Mountains Chapter of Trout Unlimited, Inc. v. City of New York, 451 F.3d 77 (2d Cir. 2006) ..... *passim*

Chevron v. Natural Resources Defense Council, Inc., 467 U.S. 837 (1984) 12, 21, 24

Christensen v. Harris County, 529 U.S. 576 (2000) 21

Committee to Save Mokelumne River v. East Bay Municipal Utility District, 13 F.3d 305 (9th Cir. 1993) 9

Del-Aware Unlimited, Inc. v. Department of Environmental Resources, 508 A.2d 348 (Pa. Commw. Ct.), *appeal denied*, 523 A.2d 1132 (Pa. 1986) 9

Dubois v. U.S. Department of Agriculture, 102 F.3d 1273 (1st Cir. 1996) 8

Friends of the Everglades, Inc. v. South Florida Water Management District, No. 02-80309, 2006 WL 3635465 (S.D. Fla. Dec. 11, 2006) 8

Pages

Goodlin v. Medtronic, Inc., 167 F.3d 1367 (11th Cir. 1999) 24

Hayburn's Case, 2 U.S. (2 Dall.) 409 (1792) 12, 13

Miccosukee Tribe of Indians v. South Florida Water Management District, 280 F.3d 1364 (11th Cir. 2002) 10

N. Plains Resources Council v. Fidelity Exploration & Development Co., 325 F.3d 1155 (9th Cir. 2003) 9

National Cable & Telecommunications Ass'n v. Brand X Internet Services, 125 S. Ct. 2688 (2005) 12

National Wildlife Federation v. Consumers Power Co., 862 F.2d 580 (6th Cir. 1988) 20

National Wildlife Federation v. Gorsuch, 693 F.2d 156 (D.C. Cir. 1982) 20

PUD No. 1 v. Washington Department of Ecology, 511 U.S. 700 (1994) 6, 22

Perez v. Ashcroft, 236 F. Supp. 2d 899 (N.D. Ill. 2002) 24

Plaut v. Spendthrift Farm, Inc., 514 U.S. 211 (1995) 12

Public Citizen Health Research Group v. Commissioner, FDA, 740 F.2d 21 (D.C. Cir. 1984) 24

Pages

Public Citizen, Inc. v. Shalala, 932 F. Supp. 13 (D.D.C. 1996) 24

South Florida Water Management District v. Miccosukee Tribe of Indians, 541 U.S. 95 (2004) 5, 10, 11, 17, 20

Squaw Valley Development Co. v. Goldberg, 375 F.3d 936 (9th Cir. 2004) 17

United States v. Law, 979 F.2d 977 (4th Cir. 1992) 9

United States v. Mead Corp., 533 U.S. 218 (2001) 24

Statutes and Regulations

Federal Statutes

28 U.S.C. § 1254(1) 1

Administrative Procedure Act, 5 U.S.C. § 554(1) 15

Administrative Procedure Act, 5 U.S.C. § 702 11

Clean Water Act § 101(a), 33 U.S.C. § 1251(a) 5, 16

Clean Water Act § 101(g), 33 U.S.C. § 1251(g) 6, 21-22

Clean Water Act § 301(a), 33 U.S.C. § 1311(a) ..... *passim*

Clean Water Act § 301(m)-(n), 33 U.S.C. § 1311(m)-(n) 23

Pages

Clean Water Act § 304(a)(4), 33 U.S.C. § 1314(a)(4) 2, 17

Clean Water Act § 402, 33 U.S.C. § 1342 ..... 5, 7

Clean Water Act § 502(6), 33 U.S.C. § 1362(6) 17

Clean Water Act § 502(12), 33 U.S.C. § 1362(12) 16

Clean Water Act § 502(14), 33 U.S.C. § 1362(14) 18

Clean Water Act § 505(a)(1), 33 U.S.C. § 1365(a)(1) 4

Clean Water Act § 509(b)(1), 33 U.S.C. § 1369(b)(1) 11

Clean Water Act § 510, 33 U.S.C. § 1370 7

Clean Water Act § 505(b)(1)(A), 33 U.S.C. § 1365(b)(1)(A) 4

Federal Regulations

40 C.F.R. § 123.1(d) (2006) 7

Exec. Order No. 13112, 64 Fed. Reg. 6,183 (Feb. 9, 1999) 14

State Regulations

N.Y. Comp. Codes R. & Regs. tit. 6, § 701.6 (1991) 3

N.Y. Comp. Codes R. & Regs. tit. 6, § 702.17(b)(1) (1998) 23

N.Y. Comp. Codes R. & Regs. tit. 6, § 703.2 (1991) 19

Pages

Miscellaneous

Jody Freeman & Laura I. Langbein, *Regulatory Negotiation and the Legitimacy Benefit,* 9 N.Y.U. Envtl. L.J. 60, 76-77 (2000).....15

National Pollutant Discharge Elimination System (NPDES) Water Transfers Proposed Rule, 71 Fed. Reg. 32,887 (proposed June 7, 2006) (to be codified at 40 C.F.R. pt. 122).....7

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-23) is reported at 451 F.3d 77. The prior opinion of the court of appeals (Pet. App. A52-77) is reported at 273 F.3d 481. The opinion of the district court (Pet. App. A85-128) is reported at 244 F. Supp. 2d 41. The district court's partial summary judgment (Pet. App. A78-84) is unreported. The initial decision of the district court (Pet. App. A24-40) and that court's decision on plaintiffs' motion for reconsideration (Pet. App. A41-51) are unreported. The court of appeals' order denying rehearing and rehearing en banc (Pet. App. A139-142) is unreported. The district court's order and amended judgment on remand (Pet. App. A129-138) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on June 13, 2006. A petition for rehearing and rehearing en banc was denied on August 25, 2006. The petition for a writ of certiorari was filed on November 20, 2006. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1) (2006).

STATEMENT

Petitioner New York City Department of Environmental Protection operates the Shandaken Tunnel ("Tunnel") as part of the New York City Catskill Water Supply System. (Pet. App. at A5). The Tunnel begins at the Schoharie Reservoir in Delaware County, passes through Greene County, and discharges into the Esopus Creek in Ulster County. When the Tunnel is in operation, water from the Schoharie Reservoir is diverted through the Tunnel for eighteen miles under a mountain range, and is discharged

into the Esopus Creek, which in turn empties into the Ashokan Reservoir. (*Id.* at A5-6).

The Schoharie Reservoir and the Esopus Creek are two different and distinct water bodies, hydrologically connected only insofar as both are tributaries of the Hudson River. (Pet. App. at A58). But for the Tunnel, water from the Schoharie Reservoir would never reach the Esopus Creek. (Pet. App. at A6; Pet. at 6). Water leaving the Schoharie would naturally flow north to the Schoharie Creek, join the Mohawk River, and flow into the Hudson River. (Pet. App. at A57-58 ("Under natural conditions, water from the Schoharie Reservoir would never reach Esopus Creek.")).

The water of the Schoharie Reservoir contains high levels of suspended solids and turbidity.[1] (*See* Pet. App. at A93). The suspended solids and turbidity present in the Schoharie Reservoir are caused at least in part by erosion in the Schoharie watershed, including surface runoff and land disturbance from human activities. (*Id.* at A93-94; *see also* Pet. App. at A6 ("water in the Schoharie Reservoir contains suspended solids from both natural and man-made causes")).[2] Consequently, water of the Schoharie Reservoir is highly turbid in comparison with other water bodies in the

---

[1] Contrary to Petitioners' assertion in this petition that turbidity is not a pollutant, (*see* Pet. at 20), the court below noted that "[t]he parties do not contest that turbidity qualifies as a pollutant under the [Clean Water Act] CWA." (Pet. App. at A6 n.1). *See also* CWA § 304(a)(4), 33 U.S.C. § 1314(a)(4) (specifically defining "conventional pollutants" to include "suspended solids").

[2] Petitioners mischaracterize the pollutants in the Schoharie Reservoir as "naturally occurring." (Pet. at 10, 20). In fact, Petitioners stipulated that the pollutants in the Schoharie Reservoir are not purely natural, but are caused at least in part by human activities. *See* Exhibit A, attached at 28 ¶ 17, 32 ¶ 17.

New York City Drinking Water System. In contrast to the Schoharie Reservoir's water, the water of the Esopus Creek is naturally clear, less turbid, and lower in total suspended solids. (Pet. App. at A28). The Esopus Creek's naturally clear water makes it an important habitat for trout. The New York State Department of Environmental Conservation ("NY DEC") has designated the Esopus Creek, between the outlet of the Shandaken Tunnel and the inlet of the Ashokan Reservoir, a Class A(T) stream, which signifies high quality water that is suitable for a trout fishery. *See* N.Y. Comp. Codes R. & Regs. tit. 6, § 701.6 (1991).

Discharges of turbidity and suspended solids from the Shandaken Tunnel have diminished the quality of water in the Esopus Creek and have all but destroyed the recreational trout fishery; fishermen no longer fish downstream from the Shandaken Tunnel Outlet. *Compare* Exhibit B, attached (exemplifying the problem Respondents seek to address) *with* Exhibit C, attached (upstream view at same time and location). Not only is the increased turbidity in the Esopus Creek aesthetically offensive, but it has also created dangerous conditions for fly fishermen to wade into the water because they cannot see the creek bed or the slippery coating left on rocks by the discharge. (*See* Pet. App. at A90-91). In addition, increased turbidity makes dry fly fishing more difficult because of the trout's inability to perceive dry fly lures in the murky waters. *See id* at A90. These cumulative harms have devastated the economic opportunities for fly fishermen guides and the aesthetic beauty of the Esopus. *See id.* at A90-91

Respondents filed this citizen suit in the United States District Court for the Northern District of New York, alleging that Petitioners' discharge of suspended solids and turbidity from the Shandaken Tunnel into the Esopus Creek without a permit violated section 301(a) of the Clean Water

Act ("CWA"), 33 U.S.C. § 1311(a). *See* CWA 505(a)(1), 33 U.S.C. § 1365(a)(1) (citizen suit provision). The district court granted Petitioners' motion to dismiss for failure to state a claim. (Pet. App. A24-40). Respondents moved for reconsideration on the grounds that the court accorded inappropriate deference to the Environmental Protection Agency's ("EPA") informal position regarding the words "addition of a pollutant."[3] The court denied Respondents' motion on the theory that the Shandaken Tunnel does not "add" pollutants into the Esopus Creek. (Pet. App. A41-51).

Respondents appealed and the Second Circuit Court of Appeals, in an opinion by Chief Judge John Walker, unanimously reversed in part, vacated in part,[4] and remanded the case. (Pet. App. A52-77). The court ruled that releases of turbidity from the Shandaken Tunnel qualified as an "addition" under the plain meaning of the CWA. (*See* Pet. App. at A67). Because water from the Schoharie Reservoir containing turbidity was "artificially diverted from its natural course" and discharged into the Esopus Creek, "a body of water utterly unrelated in any relevant sense to the Schoharie Reservoir and its watershed," the court concluded that such discharge was indeed an addition, because the turbidity came from the "outside world," meaning "any place outside the particular water body to which pollutants are introduced." (*Id.* at A71-73). The court also rejected Petitioners' theory that the Schoharie Reservoir and the Esopus Creek are unitary or "singular" waters simply because they are both navigable waters: "Such an interpretation is inconsistent with the ordinary meaning of the word 'addition.'" (*Id.* at A75;

---

[3] The CWA does not define the word "addition."

[4] The court vacated the judgment only insofar as it related to Respondents' claims that Petitioners were discharging heat, because Respondents failed to specifically include heat in their notice of intent to sue pursuant to CWA § 505(b)(1)(A), 33 U.S.C. § 1365(b)(1)(A).

see also Pet. at 19 n.15). To hold otherwise, the court noted, would violate the CWA's "broad and uncompromising policy of 'restor[ing] and maintain[ing] the chemical, physical, and biological integrity of the Nation's waters.'" (Pet. App. at A76; *see also* Pet. App. at A144, CWA § 101(a), 33 U.S.C. § 1251(a)).

On remand, the district court granted Respondents' motion for partial summary judgment on liability, finding violations of section 301(a) of the CWA for the unpermitted discharges of turbidity and suspended solids from the Shandaken Tunnel into the Esopus Creek. (Pet. App. A78-A84). The court also ordered Petitioner New York City Department of Environmental Protection ("NYC DEP") to obtain a permit pursuant to section 402 of the CWA, 33 U.S.C. § 1342(a) with respect to such releases into Esopus Creek.[5] After a bench trial on civil penalties, the court assessed $5,749,000 in penalties against Petitioners. (Pet. App. A85-128).

Petitioners appealed and the Second Circuit Court of Appeals unanimously affirmed.[6] (Pet. App. A1-23). Petitioners asked the Second Circuit to reconsider its 2001 holding in light of two intervening developments: *South Florida Water Management District v. Miccosukee Tribe of Indians*, 541 U.S. 95 (2004), and a 2005 memorandum from the EPA's general counsel, (Pet. App. A205), which posited that water transfers are not subject to the CWA permit requirement. (Pet. App. at A11). First, the court found that the *Miccosukee* decision reinforced its earlier rejection of the

---

[5] Petitioner NYC DEP applied for a SPDES permit on December 30, 2002.

[6] The Court did remand the case, however, only for recalculation of the civil penalties. The civil penalties were thus reduced to $5,225,000. (*See* Pet. App. A129-138).

"unitary-water theory of navigable waters" relied upon by Petitioners. (*Id.* at A12). Second, the court was not persuaded by and declined to defer to EPA's informal position reflected in the EPA's 2005 memorandum. (*Id.* at A12-13).

Petitioners also argued that a permit for the Tunnel would interfere with New York's statutory rights to allocate water and would thereby violate sections 101(g) and 510 of the CWA, 33 U.S.C. §§ 1251(g), 1370 (protecting a state's authority to allocate water quantities within its jurisdiction). Citing this Court, the Second Circuit explained that these provisions preserve state authority to allocate water quantity, not water *quality*: "'[s]ections 101(g) and 510(2) . . . do not limit the scope of water pollution controls.'" (*Id.* at A14 (quoting *PUD No. 1 v. Wash. Dep't of Ecology*, 511 U.S. 700, 720 (1994)). The Second Circuit held that Petitioners' "holistic" arguments about water allocation overlook the plain language of the CWA:

> [W]e pointed out that complex statutes often have seemingly inconsistent goals that must be balanced. The CWA seeks to achieve water allocation goals as well as to restore and maintain the quality of the nation's waters. [Petitioners] and the EPA would have us tip the balance toward the allocation goals. But in honoring the text, we adhere to the balance that Congress has struck and remains free to change.

(*Id.* at A15). Petitioners then filed a petition for panel rehearing and rehearing en banc, which the Second Circuit denied. (Pet. App. A139-142).

On June 7, 2006, the EPA issued a Notice of Proposed Rulemaking (Pet. App. A170-204) that would create a specific exception from National Pollutant Discharge Elimination System ("NPDES")[7] permitting requirements for water transfers occurring between waters of the United States. (*See id.* at A190). The proposed rule abandons the "unitary waters theory" in both terms and effect. (*See id.* (defining a water transfer as occurring between "two 'waters of the United States'")). It also reasserts the EPA's position in its 2005 memorandum. (Pet. App. A205-237).

On September 1, 2006, the NY DEC issued a final SPDES permit for the NYC DEP's operation of the Shandaken Tunnel. The final permit contains flexible limitations (based on the season) governing the release of turbidity and suspended solids into the Esopus Creek, and also includes a number of exemptions from compliance with effluent limitations for turbidity and temperature.[8]

---

[7] A state may also issue permits if its permitting program is approved by the EPA. State-issued permits under the CWA are called State Pollutant Discharge Elimination System ("SPDES") permits. In New York, the NY DEC issues SPDES permits. *See* CWA § 402(b), 33 U.S.C. § 1342(b), 40 C.F.R. § 123.1(d) (2006).

[8] The same respondents that filed this case are currently challenging this final permit in New York State Supreme Court, because the NY DEC's issuance of the permit constituted errors of law and a violation of lawful procedure: the permit allows the NYC DEP to operate the Shandaken Tunnel in violation of State-established water quality standards without undergoing the regulatory variance procedure that provides the only proper exceptions to meeting water quality standards. This contravenes state and federal law. Respondents also object that, in issuing the permit, the NY DEC has deprived the public of its statutory and regulatory rights to comment on the appropriate technology-based standard required by the permit. These respondents are not seeking to shut down the Shandaken Tunnel, but rather seek to compel the NY DEC to issue a legally

ARGUMENT

I

THERE IS NO SPLIT IN THE CIRCUITS, AS EVERY CIRCUIT TO CONSIDER THE ISSUE HAS AGREED THAT INTER-BASIN TRANSFERS OF POLLUTED WATER ARE SUBJECT TO CLEAN WATER ACT § 301.

A. Every court has reached the same conclusion that inter-basin transfers of polluted water require a CWA permit.

In addition to the court below, each federal court that has considered the issue has required a CWA permit for transfers of polluted water between two distinct water bodies. (Pet. App. at A19). Recently, the District Court for the Southern District of Florida held that a permit was required for the transfer of water from a polluted canal into a meaningfully distinct body of water, Lake Okeechobee. *See Friends of the Everglades, Inc. v. S. Fla. Water Mgmt Dist.*, No. 02-80309, 2006 WL 3635465, at *1, *48-*51 (S.D. Fla. Dec. 11, 2006). In another case on point, the First Circuit required a ski area to obtain a permit for pumping polluted river water through pipes directly into a pristine pond. *See Dubois v. U.S. Dep't of Agric.*, 102 F.3d 1273, 1297-98 (1st Cir. 1996).[9]

---

sufficient permit that controls the release of turbidity and suspended solids into the Esopus Creek without illegal exemptions.

[9] Petitioners attempt to distinguish *Dubois* by claiming that, unlike the case at bar, the water was "commercially exploited" for snowmaking use before it was discharged into the pond. (Pet. App. at 15 n.12). This argument ignores both the facts and holding in *Dubois*. The First Circuit noted that the polluted river water was pumped directly into the pond in May and December of each year to maintain water levels and to provide

The Ninth Circuit also required a permit for the discharge of polluted groundwater through a point source to a surface stream. *See N. Plains Res. Council v. Fidelity Exploration & Dev. Co.*, 325 F.3d 1155 (9th Cir. 2003). The Commonwealth Court of Pennsylvania even concluded that inter-basin water transfers were subject to CWA permitting requirements. *See Del-Aware Unlimited, Inc. v. Dep't of Envtl. Res.*, 508 A.2d 348 (Pa. Commw. Ct.), *appeal denied*, 523 A.2d 1132 (Pa. 1986). In each case above, the court found that the transfer of pollutants from one body of water that are discharged into a separate, distinct body of water constituted an "addition" under CWA § 301, 33 U.S.C. § 1311.[10]

---

drinking water for a nearby town. *See* 102 F.3d at 1277-79. Water from both the river and pond was also piped to snowmaking equipment on Loon Mountain, which was then discharged into the pond. *Id.* at 1278. The court held that regardless of whether water is "commercially exploited," a NPDES permit is required if, during the transfer of water, it loses its status as a "water of the United States," which was the circumstance in this case. *See id.* at 1297. In essence, the court did not find the presence of "commercial exploitation" significant. *See id.*

[10] Petitioners cite *Committee to Save Mokelumne River v. East Bay Municipal Utility District*, 13 F.3d 305 (9th Cir. 1993) and *United States v. Law*, 979 F.2d 977 (4th Cir. 1992) for the proposition that some courts have held that the diversion of water containing preexisting pollutants from one water body to another wholly distinct water body does not constitute an "addition." (Pet. at 18). However, neither of these cases address the issue in the context of an inter-basin water transfer. Rather, both courts upheld CWA liability for facilities that collected contaminated runoff and discharged this runoff to surface waters and rejected claims that a facility that merely transfers preexisting pollutants is not subject to CWA regulation. This Court also unanimously held that the CWA regulates point sources that do not themselves generate pollutants. *S. Fla. Water Mgmt Dist. v. Miccosukee Tribe of Indians*, 541 U.S. 95, 105 (2004). As such, *Mokelumne River* and *Law* do not produce incongruous results to the instant case.

B. The decision below is entirely consistent with this Court's remand in *Miccosukee.*

In *Miccosukee Tribe of Indians v. South Florida Water Management District*, 280 F.3d 1364 (11th Cir. 2002), the Eleventh Circuit ruled consistently with the First, Second, and Ninth Circuits, holding that the transfer of pollutants (phosphorus) from a flood control canal to an undeveloped wetland required a NPDES permit. The court of appeals concluded that "addition" of a pollutant means addition from the outside world, where "outside world" includes "'any place outside the particular water body to which pollutants are introduced.'" *Id.* at 1368, n.5 (quoting Pet. App. at A71).

This Court granted certiorari and vacated and remanded the decision on narrow grounds. *See S. Fla. Water Mgmt. Dist. v. Miccosukee Tribe of Indians*, 541 U.S. 95 (2004). The Court affirmed the reasoning below on the question presented; specifically, a point source need not generate pollutants, but need only convey the pollutants to be subject to CWA regulation. *Id.* at 105. The Court went on to vacate the decision below on the grounds that the district court's summary judgment determination that the canal and the wetland were different water bodies was premature on the record before it, and remanded for a determination whether the two water bodies were hydrologically connected or distinct. *See id.* at 99.

Thus, this Court's *Miccosukee* decision intimated that if the canal and wetland are meaningfully distinct, a NPDES permit would be required for the inter-basin water transfer because pollutants are "added" from the outside world. *See id.* at 112. To illustrate the situation when a statutory "addition" would not occur, this Court quoted the Second Circuit in the instant case with approval: "As the Second

Circuit put it in *Trout Unlimited*, '[i]f one takes a ladle of soup from a pot, lifts it above the pot, and pours it back into the pot, one has not 'added' soup or anything else to the pot.'" *Id.* at 109-10 (quoting Pet. App. at A72). By remanding the *Miccosukee* case for a trial to determine whether the waters involved in that case were "two pots of soup, not one,'" *id.* at 110, this Court clearly adopted the Second Circuit's distinction between inter-basin transfers (for which a permit is required) and intra-basin transfers (for which no permit would be required) as being legally significant under the Clean Water Act. The Second Circuit's conclusion that an "addition" from the "outside world" occurs when polluted water from the Schoharie Reservoir is discharged into the separate and distinct Esopus Creek is, therefore, consistent with this Court's understanding behind the remand in *Miccosukee*.

II

THE COURT'S INTERVENTION IS BOTH UNTIMELY AND UNWARRANTED IN LIGHT OF THE EPA'S PENDING RULEMAKING.

Petitioners ask the Court to either grant the petition while relevant rulemaking is pending or hold the case until the EPA adopts a final rule. (*See* Pet. at 30). If the Court grants certiorari, any decision it makes could be subject to modification by the EPA rulemaking proceeding and judicial review of any final rule. *See* CWA § 509(b)(1), 33 U.S.C. § 1369(b)(1); Administrative Procedure Act ("APA") 5 U.S.C. § 702. The time is simply not ripe for the Court to have the last word on inter-basin water transfers. Instead of generating a complex legal and procedural mess, the Court should allow the pending rulemaking to run its normal course, and defer resolution of this issue to a proceeding challenging the final rule.

A. Granting certiorari would not finally resolve the issue given the pendency of EPA's rulemaking.

If this Court affirms the Second Circuit, the EPA's forthcoming rulemaking could potentially overrule this Court's decision. This would violate the principle of *Hayburn's Case*, 2 U.S. (2 Dall.) 409 (1792), that "Congress cannot vest review of the decisions of Article III courts in officials of the Executive Branch." *Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211, 218 (1995). Assuming the final rule will reassert the proposed rule, further litigation will be required to determine (1) whether this Court's interpretation of inter-basin water transfers was the only possible interpretation or just the "best one"; (2) whether the final rule is entitled to *Chevron* deference; and (3) whether the rule is a permissible interpretation of the CWA or arbitrary and capricious. *See Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs.*, 125 S. Ct. 2688 (2005); *Chevron v. Natural Res. Def. Council, Inc.*, 467 U.S. 837 (1984).

Under *Brand X*, this Court squarely held that a "court's prior judicial construction of a statute trumps an agency construction otherwise entitled to *Chevron* deference only if the prior court decision holds that its construction follows from the unambiguous terms of the statute and thus leaves no room for agency discretion." 125 S. Ct. at 2700. In the instant case, the Second Circuit unanimously affirmed – twice – that Petitioners' discharge of suspended solids from the Shandaken Tunnel into the Esopus Creek constituted an "addition" within the plain meaning of the CWA; no other permissible interpretation of the statute was conceivable. (*See* Pet. App. at A15, A71, A76). As the court of appeals explained, "When the water and the suspended sediment therein passes from the Tunnel into the Creek, an 'addition' of a 'pollutant' from a 'point source' has been made to a

'navigable water,' and the terms of the [CWA] are satisfied." (Pet. App. at A73; *see also id.* at A71, A76 (holding that "the transfer of water containing pollutants from one body of water to another, distinct body of water is plainly an addition . . . . [N]one of the statute's broad purposes sways us from what we find to be the plain meaning of its text")). By finding the terms of the statute unambiguous as applied to Petitioners' inter-basin transfer of polluted water, the Second Circuit's affirmation of the plain meaning of the CWA trumps any contrary interpretation by the EPA.

Under *Brand X*, the EPA cannot correct a misinterpretation of law when a federal court declared the law to be unambiguous. *See* 125 S. Ct. at 2700; *cf. Hayburn's Case*, 2 U.S. (2 Dall.) 409. To avoid this awkward result, for a decision by the Supreme Court in this case to have finality, the Court's opinion must garner majority votes for a "plain meaning" or "specific intent" interpretation that the CWA regulates inter-basin water transfers. Final resolution of the water transfer issue is best deferred until the EPA adopts a final rule, and that rule has been reviewed by the lower courts before being presented to the Supreme Court for a final judicial determination of the proper interpretation of the CWA term "addition."

B. It is inappropriate for the Court to consider the final rule on this record.

If the Court grants certiorari and the final rule is promulgated during briefing, then the Court could consider the final rule to settle the issue. But nothing would be more inappropriate than for the Court to conduct judicial review of the final rule when the rulemaking record is not before the Court. Without the benefit of the administrative record, full briefing, and lower court review, the Court cannot possibly address the validity of the final rule. Not until after the final

rule goes through all the various procedural challenges would the question of any final rule's validity be ripe for review.

It should be noted that Petitioners assume that the proposed rule makes the final rule a *fait accompli*. Their assertion that the rule "*will* confirm that water transfers are not subject to the NPDES permitting program. . . . [The rule] *will* thus answer precisely the question that was before the Second Circuit . . . ." (Pet. at 27) (emphasis added) is highly speculative because nothing indicates that the final rule will confirm the legal premise underlying the proposed rule. During the public comment period, numerous and extensive comments on the proposed rule were submitted. Many comments challenged the legality of the proposed rule and also raised issues the EPA never identified.[11] Presumably, the EPA is now considering all of these comments. Petitioners assume that this notice and comment period will have no impact on the final rule, when in fact such comments could very well change the final rule's result. Such speculation is a perfect example why this petition is not ripe for the Court's review.

C. There is no reason to hold for the final rule.

Petitioners' alternate request to hold the petition for the final rule is unwarranted. They do not cite a single case where the Supreme Court held a petition, or granted and vacated, based on a pending rulemaking. The existence of EPA's pending rulemaking warrants denial of the petition,

---

[11] For example, Respondents raised the concern that the proposed rule would violate Executive Order 13112, issued to prevent the introduction of invasive species. *See* 64 Fed. Reg. 6,183 (Feb. 9, 1999). Water transfers not subject to a NPDES permit will induce the addition or transfer of invasive species across water bodies.

not the addition of further delay after five years of litigation. There is no certainty if or when a final rule will ever be issued, and the average time for a rulemaking process, not including litigation, is three years. *See* Jody Freeman & Laura I. Langbein, *Regulatory Negotiation and the Legitimacy Benefit,* 9 N.Y.U. Envtl. L.J. 60, 76-77 (2000). During that time, a hold would allow the NYC DEP to continue polluting the Esopus Creek in expectation of a rule that, even if promulgated after notice and comment, would likely fail judicial review.

Moreover, holding the petition will not affect the judgment in this case. If the EPA later "changes" the law in a final rule to exclude inter-basin water transfers from CWA permitting requirements, this would not undo the fact that the NYC DEP was in violation of the law, as declared by the Second Circuit, every day for which it was assessed a civil penalty. (*See* Pet. App. at A134 (civil penalty calculation)).[12] The EPA's rulemaking cannot affect the penalty judgment where the Second Circuit twice declared that the NYC DEP's discharges violated the plain meaning of the CWA.[13] *See Brand X*, 125 S. Ct. at 2700. In addition, the NYC DEP has now complied with the injunctive relief by obtaining a SPDES permit.

---

[12] The district court only assessed civil penalties for the days of violations occurring after the Second Circuit's October 2001 decision that specifically held NYC DEP to be in violation of the CWA.

[13] The final rule will also have no retroactive effect. *See Bowen v. Georgetown University Hospital*, 488 U.S. 204 (1988); *see also* APA 5 U.S.C. § 554(1). Petitioners will not be excused from compliance during the time period penalties were assessed.

III

THE DECISION BELOW IS CORRECT.

A. The Second Circuit's unanimous holding applies the plain language of the Clean Water Act.

The principal, unwavering objective of the Clean Water Act is to "restore and maintain the chemical, physical, and biological integrity of the Nation's waters." (Pet. App. at A144, CWA § 101(a), 33 U.S.C. § 1251(a)). To accomplish this goal, the CWA prohibits "the discharge of any pollutant by any person" without or in violation of a permit. (*Id.* at A147, CWA § 301(a), 33 U.S.C. § 1311(a)). This translates to the prohibition of "*any* addition of *any* pollutant to navigable waters of the United States from *any* point source." (*Id.* at A166, CWA § 502(12), 33 U.S.C. § 1362(12) (emphasis added)).

Petitioners' discharge of turbidity and suspended solids from the Shandaken Tunnel into the Esopus Creek falls squarely within the CWA's definition of "discharge of a pollutant." (*See id.*) The court below twice declared that Petitioners' conveyance of water containing turbidity and suspended solids from one watershed, through a tunnel underneath a mountain range into higher quality waters of a trout fishery in a separate and distinct watershed, constituted an addition of a pollutant from a point source into a navigable water under CWA § 301, 33 U.S.C. § 1311. (*See* Pet. App. at A15; A67). The unresolved factual question in *Miccosukee* was whether the canal and the wetland area are meaningfully distinct water bodies. *See* 541 U.S. at 112. Conversely, this Court already has the answer in the instant case: the Schoharie Reservoir and the Esopus Creek are not hydrologically connected because they are located in two

separate and distinct watersheds.[14] This is not a case where the soup ladle pours soup back into the same pot; rather, the soup ladle is pouring soup into a different pot located on a different stove.

Desperate for any grounds of reversal, Petitioners raise new questions about whether the CWA § 301 elements of "pollutant," "navigable water," and "point source," are satisfied, even though these elements were not at issue in the court below. (*See* Pet. at 17, 19-20). In fact Petitioners either stipulated or did not dispute the CWA elements they now seek to raise for the first time in a petition for certiorari. First, it is undisputed that suspended solids and turbidity discharged by Petitioners are pollutants regulated under the CWA. (*See* Pet. App. at A81-82). As explained *supra* in footnote 1, CWA § 304(a)(4), 33 U.S.C. § 1314(a)(4) defines "conventional pollutants" to include "suspended solids." When rock, sand, and cellar dirt (which are pollutants defined by CWA § 502(6)) are suspended in water, they become suspended solids and make the water turbid. *See, e.g., Squaw Valley Dev. Co. v. Goldberg*, 375 F.3d 936, 939 n.1 (9th Cir. 2004) ("Turbidity refers to 'suspended sediment,' or the amount of dirt in the water."). Moreover, Petitioners do not dispute that turbidity qualifies as a pollutant under the CWA." (Pet. App. at A6 n.1). Second, the NYC DEP specifically admitted that the Esopus Creek is a navigable water.[15] (*See* Exhibit A, attached at 29 ¶ 27, 33 ¶

---

[14] Throughout their brief, Petitioners disingenuously failed to make clear to the Court the lack of any hydrological connection between the Schoharie and the Esopus. As the Second Circuit stated, "Absent the man-made diversion through the Tunnel, water from the Schoharie Reservoir would never reach the Esopus Creek." (Pet. App. at A6).

[15] Because there is no question that the Esopus Creek is a navigable water of the United States, Petitioners' suggestion that the absence of the word "any" before "navigable waters" means something less than "any navigable waters" fails. (*See* Pet. at 17).

27; *see also* Pet. App. at A81). Third, and perhaps the most misleading, is Petitioners' omission of the word "tunnel" when quoting the CWA definition of "point source" to suggest that the discharge of turbidity and suspended solids is really "non-point source" pollution. (Pet. at 19-20). The Shandaken Tunnel is clearly a point source because the actual definition of "point source" includes the word "tunnel":

> The term "point source" means any discernible, confined and discrete conveyance, including but not limited to any pipe, ditch, channel, *tunnel*, conduit, well, discrete fissure, container, rolling stock, concentrated animal feeding operation, or vessel or other floating craft, from which pollutants are or may be discharged.

(Pet. App. at A166, CWA § 502(14), 33 U.S.C. § 1362(14) (emphasis added); *see also* A81 ("Nor can there be any dispute that the Shandaken Tunnel is a point source.")).

B. This is not a "unitary waters" case.

Petitioners reassert the so-called "unitary waters" theory, which posits that "waters of the United States' form a collective body . . . ." (Pet. at 19 n.15).[16] They argue that the transfer of pollutants from one body of navigable water to another does not "add" anything to the latter, *id.* at 16-19, even though the water bodies are eighteen miles apart in two

---

[16] Under the "unitary waters" theory, the statutory term "waters of the United States" would be given a "unitary" interpretation such that all navigable waters of the United States are considered one unitary water body, whereby pollutants already in such waters could not logically be added to waters of the United States. (*See* Pet. App. at A75).

separate watersheds. But the EPA has now abandoned this theory[17] and both panels in the Second Circuit unanimously rejected this approach: "[T]his theory would lead to the absurd result that the transfer of water from a heavily polluted, even toxic, water body to one that was pristine via a point source would not constitute an 'addition' of pollutants and would not be subject to the CWA's NPDES permit requirement." (Pet. App. at A9; *see also* Pet. App. at A75). The court below correctly rejected this theory because it would be absurd to deny that Petitioners are adding pollutants "from the outside world" into the Esopus Creek.

The Esopus Creek represents the paradigmatic case in which polluted water is discharged into a trout stream and violates state water quality standards. Pursuant to New York law, a discharge violates water quality standards of the Esopus Creek if it creates a "substantial visible contrast to natural conditions" in the water. N.Y. Comp. Codes R. & Regs. tit. 6, § 703.2 (1991); *compare* Exhibit B, attached (substantial visible contrast) *with* Exhibit C, attached (upstream view at same time and location). Because such standards directly affect the parameters of NYC DEP's SPDES permit, a "unitary waters" approach to regulation would not reduce the turbidity and suspended solids that have beset this individual water body. *See Miccosukee*, 541 U.S. at 107.

---

[17] The EPA has abandoned the "unitary waters" theory in both terms and effect. In its proposed rule and 2005 memorandum, the EPA refers to water transfers as occurring "between two 'waters of the United States.'" (Pet. App. at A190; *see also* A206). This definition forecloses any possible interpretation that the waters of the United States be viewed as a unitary water body.

C. Petitioners' reliance on *Gorsuch* and *Consumers Power* is misplaced.

Petitioners attempt to confuse the issues in this case by arguing that *National Wildlife Federation v. Gorsuch*, 693 F.2d 156 (D.C. Cir. 1982), and *National Wildlife Federation v. Consumers Power Co.*, 862 F.2d 580 (6th Cir. 1988), are controlling. (*See* Pet. at 17-18, 21). Both circuits held that water drawn from and then released back into the same water body is not an "addition" to navigable waters under the CWA. *See* 693 F.2d at 183; 862 F.2d at 587. Contrary to Petitioners' assertion, *Gorsuch* and *Consumers Power* are inapposite to the instant case because, as noted by the Second Circuit, they involved "recirculation of water, without anything added 'from the outside world.'" (Pet. App. at A71).

In *Gorsuch*, the D.C. Circuit held that water passing through a dam into a stream did not constitute a discharge from a point source under the CWA. *See* 693 F.2d at 183. The court in *Consumers Power* addressed the same issue with respect to a hydroelectric turbine that entrained fish as it pumped water uphill and then returned the water plus the mutilated fish to the same water body. This process was also found not to constitute an addition, because the fish were already present in water; only their physical form changed. *See* 862 F.2d at 587.

While acknowledging the *Gorsuch* gloss on the statutory term of "addition" to require an addition "from the outside world," 693 F.2d at 174, the Second Circuit drew the inescapable conclusion that polluted water transferred miles under a mountain range "strains past the breaking point the assumption of 'sameness' made by the *Gorsuch* and *Consumers Power* courts." (Pet. App. at A72). The court explained:

> Here, water is artificially diverted from its natural course and travels several miles from the Reservoir through the Shandaken Tunnel to Esopus Creek, a body of water utterly unrelated in any relevant sense to the Schoharie Reservoir and its watershed. No one can reasonably argue that the water in the Reservoir and the Esopus are in any sense the "same," such that "addition" of one to the other is a logical impossibility.

(*Id.* at A72-A73).

Moreover, the *Gorsuch* decision was based almost exclusively on deference to informal EPA interpretations of the term "addition." *See Gorsuch*, 693 F.2d at 183. Those types of informal agency interpretations are no longer entitled to *Chevron* deference under this Court's decision in *Christensen v. Harris County*, 529 U.S. 576 (2000). *Gorsuch* and *Consumers Power* not only presented critically different facts, they are also of questionable precedential value under current law.

IV

THE REQUIREMENT OF A CWA PERMIT DOES NOT UNDULY BURDEN NEW YORK CITY'S ABILITY TO TRANSFER WATER.

A. The Supreme Court held that CWA § 101(g) presumes legitimate regulation of water quality.

Petitioners complain that a SPDES permit would not only significantly impair their ability to allocate water to New York City, but it would also violate CWA § 101(g), 33

U.S.C. § 1251(g). (*See* Pet. at 25-26). This is simply untrue.[18] The CWA requires state water allocation systems to accommodate legitimate water quality regulations. Section 101(g), which preserves the states' authority to allocate water *quantity* and water rights, does not preclude the regulation of water *quality* through the NPDES permit program. Congress' directive strikes a balance by respecting existing water allocation systems while simultaneously preventing and reducing pollution of the nation's waters: "Federal agencies shall co-operate with State and local agencies to develop comprehensive solutions to prevent, reduce and eliminate pollution in concert with programs for managing water resources." (Pet. App. at A146).

Indeed, this Court upheld the primacy of the CWA's water quality regulations over the reservation of water allocation authority in *PUD No. 1 v. Washington Department of Ecology*, 511 U.S. 700, 720 (1994) ("Sections 101(g) and 510(2) . . . do not limit the scope of water pollution controls that may be imposed on users who have obtained, pursuant to state law, a water allocation."). The court below also declared that "the power of the states to allocate quantities of water within their borders is not inconsistent with federal regulation of water quality." (Pet. App. at A13-14).

B. New York City conceded that a SPDES permit allows for flexibility.

In hearings related to its SPDES permit application, the NYC DEP endorsed the flexibility of the CWA permit scheme as well as the flexibility built into its own permit. (*See* Pet. App. at A16 n.6). For example, the permit limitations on the discharge of turbidity and suspended solids

---

[18] The court below found Petitioners' claim to be "alarmist and unwarranted." (Pet. App. at A18).

change with the season and the permit also contains numerous exemptions from meeting water quality standards.[19] The NYC DEP could also seek a temporary exemption from compliance with water quality standards if the NY DEC grants a variance.[20]

Requiring a SPDES permit for the conveyance of polluted water does not unduly burden the NYC DEP's ability to allocate water or infringe on its water rights. New York City still holds a right to water; the permit requirement simply means that if the NYC DEP wishes to move polluted water to another water body and discharge it through a point source, it must obtain a permit relating to the quality of the water being moved. Petitioners' transfer of polluted water through the Shandaken Tunnel precludes the achievement of New York State water quality standards needed to protect the trout fishery and recreational uses of the Esopus Creek. The only hope of achieving this standard is for the NY DEC to develop a permit with appropriate turbidity limits and technology-based requirements for the Shandaken Tunnel discharge.

---

[19] Various respondents here are challenging the permit's level of flexibility due to the numerous built-in exemptions. *See supra* note 8.

[20] The NY DEC will grant a "variance" if the requestor demonstrates, *inter alia*, that achieving an effluent limitation is not feasible because "naturally occurring pollutant concentrations prevent attainment of the standard or guidance value." N.Y. Comp. Codes R. & Regs. tit. 6, § 702.17(b)(1) (1998); *see also* CWA § 301(m)-(n), 33 U.S.C. § 1311(m)-(n) (the federal variance provisions). Respondents argue in their permit challenge that NYC DEP never properly applied for, nor has the NY DEC ever granted, a variance for the operation of the Shandaken Tunnel.

V

THE EPA'S PROPOSED RULE IS NOT ENTITLED TO DEFERENCE.

Petitioners make much of the fact that the Second Circuit ignored and failed to defer to the EPA's six-day-old proposed rule on water transfers.[21] (*See* Pet. at 4). Under settled law, however, the proposed rule is entitled to little, if any, deference. Courts do not accord authoritative deference to a pending rule. *See, e.g.*, *Goodlin v. Medtronic, Inc.*, 167 F.3d 1367, 1375 n.15 (11th Cir. 1999) (refusing to give the FDA's proposed rule any authoritative weight or deference); *Public Citizen, Inc. v. Shalala*, 932 F. Supp. 13, 18 n.6 (D.D.C. 1996) (citing *Public Citizen Health Research Group v. Comm'r, FDA*, 740 F.2d 21, 32 (D.C. Cir. 1984) (noting that a "tentative conclusion articulated in a nonfinal, proposed rule does not command deference from the Court nor is it binding on the agency"). Under *United States v. Mead Corp.*, 533 U.S. 218, 221 (2001), administrative decisions not subject to *Chevron* deference may be entitled to a lesser degree of deference – to the extent the agency's position is persuasive. Full deference under *Chevron* is only given to regulations that were promulgated after a full notice and comment period, or after similar formalities. *See, e.g.*, *Perez v. Ashcroft*, 236 F. Supp. 2d 899, 903 (N.D. Ill. 2002). Because the EPA's proposed regulation has yet to be promulgated to represent the agency's final interpretation of the CWA, the Court should not apply *Chevron* deference to this pending rule.

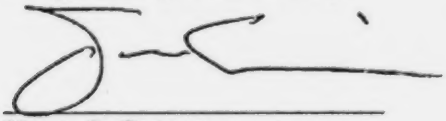
---

[21] Had the notice of proposed rulemaking been issued much earlier, it would not change the Second Circuit's decision because the proposed rule simply reasserts the 2005 EPA memorandum, which the court below devoted a number of paragraphs to in its opinion. (*See* Pet. App. at A10-11, A12 n.5). In addressing the agency interpretation, the court reviewed it, considered it, and rejected it as being unpersuasive. (*Id.* at A12 n.5).

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully Submitted,



KARL S. COPLAN
Counsel of Record
DANIEL E. ESTRIN
PACE ENVIRONMENTAL LITIGATION CLINIC, INC.
Attorneys for Catskill Mountains Chapter of Trout Unlimited, Inc., Theodore Gordon Flyfishers, Inc., Catskill-Delaware Natural Water Alliance, Inc., Federated Sportsmen's Clubs of Ulster County, Inc., and Riverkeeper, Inc.
78 North Broadway
White Plains, New York 10603
(914) 422-4343
(914) 422-4437 (Fax)

EXHIBITS

EXHIBIT A

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

----------X

CATSKILL MOUNTAINS CHAPTER OF TROUT UNLIMITED, INC., THEODORE GORDON FLYFISHERS, INC., CATSKILL-DELAWARE NATURAL WATER ALLIANCE, INC., FEDERATED SPORTSMEN'S CLUBS OF ULSTER COUNTY, INC., and RIVERKEEPER, INC.

Plaintiffs,

-against-

THE CITY OF NEW YORK, NEW YORK CITY DEPARTMENT OF ENVIRONMENTAL PROTECTION, and JOEL A- MTELE, SR., COMMISSIONER OF DEPARTMENT OF ENVIRONMENTAL PROTECTION,

Defendants.

----------X

CIVIL ACTION
NO. 00-CV-511
(FJS/RFT)

PLAINTIFFS' STATEMENT OF MATERIAL FACTS IN SUPPORT OF THEIR MOTION FOR PARTIAL SUMMARY JUDGMENT

Pursuant to Local Rules 56.1 and 7.1, Plaintiffs submit the following Statement of Material Facts in Support of their Motion for Partial Summary Judgment:

1. Plaintiff Catskill Mountains Chapter of Trout Unlimited, Inc. ("C.M.C.T.U.") is a not-for-profit corporation, organized under the laws of the State of New York. The

13; N.Y.C. D.E.P., Turbidimetric Characteristics of the Schoharie Reservoir Report. 1. 8 (1998), attached hereto as Ex. 9; N.Y.C. D.E.P., Photograph: Sept. 19, 1999 - Schoharie Reservoir Gatehouse, attached hereto as Ex. 17.

17. The suspended solids present in the Schoharie Reservoir are caused at least in part by erosion in the Schoharie watershed, including erosion resulting from land disturbance from human activities. N.Y.C. D.E.P., New York City's 2001 Watershed Program Summary, Assessment and Long-Term Plan submitted to the federal EPA Environmental Protection Agency pursuant to the May 1977 New York City Filtration Avoidance Determination ("2001 FAD Report") 237 (Dec. 2001), attached hereto as Ex. 10; N.Y.C. D.E.P., Short- and Long-Term Plans to Reduce Turbidity in the Schoharie and Ashokan Reservoirs, 1-2 (1993), attached hereto as Ex. 11.

18. The Schoharie Reservoir contains a high level of turbidity compared with other waterbodies within the New York City Drinking Water System. 1997 DEIS at 3-8 & 3-9. attached hereto as Ex. 5; 2001 FAD Report at 270, attached hereto as Ex. 10; N.Y.C. D.E.P., Spatial Distribution and Characterization of Sediment Flux in Ashokan Reservoir. 63 (1996), attached hereto as Ex. 12; N.Y.C. D.E.P., Turbidimetric Characteristics of the Schoharie Reservoir Report, 1, 8. attached hereto as Ex. 9; N.Y.C. D.E.P., 1987-1998 Catskill District Limnology Data for the Schoharie Reservoir, attached hereto as Ex. 13; N.Y.C. D.E.P., Photograph: Sept. 19, 1999 – Schoharie Gatehouse, attached hereto as Ex. 17.

19. The natural water conditions of the Esopus Creek are almost always more clear, or less turbid and lower in total suspended solids, than the water of the Schoharie basin. N.Y.C. D.E.P., 1987-1998 Catskill District Limnology Data for the Schoharie

23. The discharges from the Shandaken Tunnel into the Esopus Creek almost always contain a higher level of turbidity and total suspended solids than the natural water conditions of the Esopus Creek. Summary' Table of Turbidity and Suspended Solids from January 1. 1987 through December 30, 1998, attached hereto as Ex. 36; N.Y.C. D.E.P., 1987-1998 Catskill District Stream Data for Sampling Site "E5," attached hereto as Ex. 15; N.Y.C. D.E.P., 1987-1998 Catskill District Stream Data for Sampling Site "SRR2," attached hereto as Ex. 14; N.Y.C. D.E.P., photograph: Shandaken Tunnel Outlet 2; attached hereto as Ex. 18; Urban Aff. Ex. B (photograph dated 11/10/01); Urban Aff. Ex. C (photograph dated 11/10/01); Urban Aff. Ex. D (photograph dated 1/1/02).

24. The discharges from the Shandaken Tunnel make it unpleasant for Plaintiffs' members to fish in the portion of the Esopus Creek downstream of the Tunnel's outlet and oftentimes make it unsafe for Plaintiffs' members to wade into the stream. Urban Aff. ¶ 9; Darrow ¶ 10; Duffy Aff. ¶ 9; and Farrell Aff. ¶ 8.

25. The discharges from the Shandaken Tunnel are unsightly and aesthetically offensive to Plaintiffs' members. Urban Aff. ¶ 9; Darrow ¶ 10; Duffy Aff. ¶ 9; and Farrell Aff. ¶ 8.

26. Because of the turbid, muddy conditions in the Esopus Creek created by Defendants' discharges, Plaintiffs' members who are professional fishing guides are no longer able to use the Esopus Creek to conduct their business. Darrow Aff. ¶ 9, 10, 11.

27. The Esopus Creek is navigable in fact, as it is routinely traveled by canoe and kayak. Urban Aff. ¶ 8; Duffy Aff. ¶ 8.

28. The Esopus Creek is a tributary of the Hudson River. 1997 DEIS at 1-7, attached hereto as Ex. 5; Meltzer Letter at 1,3, attached hereto as Ex. 7. The Hudson

34. Defendants' violations have continued after March 31, 2000. Urban Aff. ¶ 10; an Farrell Aff. ¶ 9.

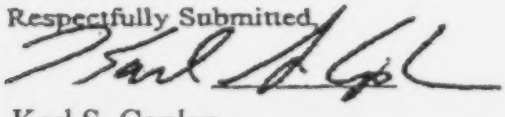
35. Neihter E.P.A. nor N.Y.S. D.E.C. has commenced a court action or administrative proceeding against Defendants related to the allegations set forth in Plaintiffs' Complaint. Ans. ¶ 5.

36. Jurisdiction of this Court is properly invoked pursuant to section 505 of Clean Water Act, 33 U.S.C. §1365(a) (Clean Water Act citizen suit provision) and 28 U.S.C. §1311 (federal question). Cplt. ¶ 2.

37. Venue is proper in this Court pursuant to section 505(c)(1) of the Clean Water Act, 33 U.S.C. §1365(c)(1), because the source of the violations complained is located in the district. Cplt. ¶ 19, as admitted by Ans. ¶ 19.

Dated: March 13, 2002
White Plains, New York

Respectfully Submitted,



Karl S. Coplan
Bar Code 5103 86
Attorney for Plaintiffs
Pace Environmental Litigation
Clinic, Inc.
78 North Broadway
White Plains, New" York 10603

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

----------X

CATSKILL MOUNTAINS CHAPTER OF TROUT UNLIMITED INC., THEODORE GORDON FLYFISHERS, INC., CATSKILL-DELAWARE NATURAL WATER ALLIANCE INC., FEDERATED SPORTSMEN'S CLUBS OF ULSTER COUNTY INC., and RIVERKEEPER, INC.,

Plaintiffs,

- against –

THE CITY OF NEW YORK, NEW YORK CITY DEPARTMENT OF ENVIRONMENTAL PROTECTION, and JOEL A. MELE, SR., COMMISSIONER OF DEPARTMENT OF ENVIRONMENTAL PROTECTION,

Defendants.

----------X

00 Civ. 0051 (FJS)(RFT)

DEFENDANTS' RESPONSE TO PLAINTIFFS' LOCAL RULE 7.1 STATEMENT

Pursuant to Rule 7.1 of the Local Rules of this Court, defendants, by their attorney, Michael A. Cardozo, Corporation Counsel of the City of New York, respond to and controvert the following facts that plaintiffs assert in their Statement of Material Facts:

1. Deny knowledge or information sufficient to form a belief as to the truth of the allegations set forth in paragraph 1 plaintiffs' Local Rule 7.1 Statement.

2. Deny knowledge or information sufficient to form a belief as to the truth of the allegations set forth in paragraph 2 plaintiffs' Local Rule 7.1 Statement.

3. Deny knowledge or information sufficient to form a belief as to the truth of the allegations set forth in paragraph 3 plaintiffs' Local Rule 7.1 Statement.

4. Deny knowledge or information sufficient to form a belief as to the truth of the allegations set forth in paragraph 4 plaintiffs' Local Rule 7.1 Statement.

15. Admit the allegations set forth in paragraph 15 of plaintiffs' Local Rule 7.1 Statement.

16. Admit the allegations set forth in paragraph 16 of plaintiffs' Local Rule 7.1 Statement.

17. Admit the allegations set forth in paragraph 17 of plaintiffs' Local Rule 7.1 Statement.

18. Admit the allegations set forth in paragraph 18 of plaintiffs' Local Rule 7.1 Statement.

19. Deny the allegations set forth in paragraph 19 of plaintiffs' Local Rule 7.1 Statement. See Affidavit of Michael A. Principe, Ph. D., sworn to April 18, 2002 ("Principe Aff.") U 34, 35, and 37, and Exhibit C thereto at p. 25.

20. Admit the allegations set forth in paragraph 20 of plaintiffs' Local Rule 7.1 Statement.

21. Admit the allegations set forth in paragraph 21 of plaintiffs' Local Rule 7.1 Statement.

22. Admit the allegations set forth in paragraph 22 of plaintiffs' Local Rule 7.1 Statement.

23. Admit the allegations set forth in paragraph 23 of plaintiffs' Local Rule 7.1 Statement.

24. Deny knowledge or information sufficient to form a belief as to the truth of the allegations set forth in paragraph 24 of plaintiffs' Local Rule 7.1 Statement.

25. Deny knowledge or information sufficient to form a belief as to the truth of the allegations set forth in paragraph 25 of plaintiffs' Local Rule 7.1 Statement.

26. Deny knowledge or information sufficient to form a belief as to the truth of the allegations set forth in paragraph 26 of plaintiffs' Local Rule 7.1 Statement

27. Admit the allegations set forth in paragraph 27 of plaintiffs' Local Rule 7.1 Statement.

28. Admit the allegations set forth in paragraph 28 of plaintiffs' Local Rule 7.1 Statement.

29. Admit the allegations set forth in paragraph 29 of plaintiffs' Local Rule 7.1 Statement.

30. Admit the allegations set forth in paragraph 30 of plaintiffs' Local Rule 7.1 Statement.

31. Paragraph 31 of plaintiffs' Local Rule 7.1 Statement is a legal conclusion and is not a statement of a material fact, and no response is required under Local Rule 7.1. Defendants deny that the Letter of Intent to Sue notified them of any alleged violations of the Clean Water Act based on an alleged discharge of turbidity. See Letter of Intent to Sue, Plaintiffs' Exhibit 3.

32. Paragraph 32 of plaintiffs' Local Rule 7.1 Statement is a legal conclusion and is not a statement of a material fact, and no response is required under Local Rule 7.1. Defendants deny that the Letter of Intent to Sue notified them of any alleged violations of the Clean Water Act based on an alleged discharge of turbidity. See Letter of Intent to Sue, Plaintiffs' Exhibit 3.

33. Admit the allegations set forth in paragraph 33 of plaintiffs' Local Rule 7.1 Statement.

34. The reference to "violations" is a legal conclusion to which no response is required. Defendants deny that any "violations" have occurred. Defendants admit that they have continued to discharge water through the Shandaken Tunnel since March 31, 2000 and that the discharges have contained levels of turbidity and suspended solids as set forth in paragraphs 13, 35-37,41, and 45 of the Principe Affidavit.

35. Admit the allegations set forth in paragraph 35 of plaintiffs' Local Rule 7.1 Statement

36. Paragraph 36 of plaintiffs' Local Rule 7.1 Statement is a legal conclusion and is not a statement of a material fact, and no response is required under Local Rule 7.1.

37. Paragraph 37 of plaintiffs' Local Rule 7.1 Statement is a legal conclusion and is not a statement of a material fact, and no response is required under Local Rule 7.1.

Dated: New York, New York
April 18, 2002

MICHAEL A. CARDOZO
Corporation Counsel of the
City of New York
Attorney for Defendants
60 John Street
New York, New York 10038
(212)232-1108
By: s/_____
Hilary Meltzer(506619)
Senior Counsel
Environmental Law Division

EXHIBIT B

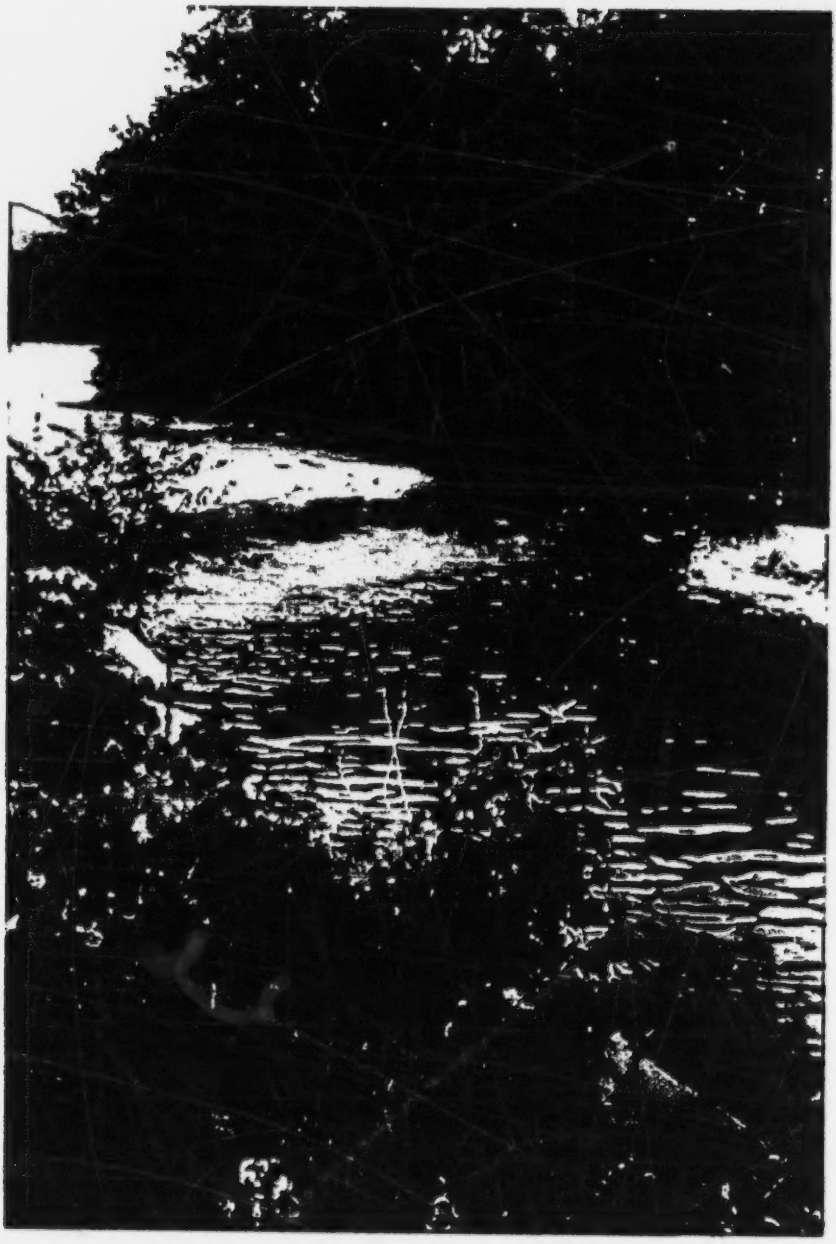


EXHIBIT C

(1)

FILED
JAN 26 2007
OFFICE OF THE CLERK
SUPREME COURT, U.S.

No. 06-729

IN THE

Supreme Court of the United States

CITY OF NEW YORK, NEW YORK CITY DEPARTMENT OF ENVIRONMENTAL PROTECTION, AND JOEL A. MIELE, SR., COMMISSIONER OF DEPARTMENT OF ENVIRONMENTAL PROTECTION.

Petitioners,

v.

CATSKILL MOUNTAINS CHAPTER OF TROUT UNLIMITED, INC., THEODORE GORDON FLYFISHERS, INC., CATSKILL-DELAWARE NATURAL WATER ALLIANCE, INC., FEDERATED SPORTSMEN'S CLUBS OF ULSTER COUNTY, INC., RIVERKEEPER, INC., STATE OF NEW YORK, NEW YORK STATE DEPARTMENT OF ENVIRONMENTAL CONSERVATION, AND ERIN M. CROTTY, COMMISSIONER OF THE NEW YORK STATE DEPARTMENT OF ENVIRONMENTAL CONSERVATION,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF IN OPPOSITION FOR NEW YORK STATE RESPONDENTS

BARBARA D. UNDERWOOD*
Solicitor General
MICHELLE ARONOWITZ
Deputy Solicitor General
JAMES M. TIERNEY
Assistant Attorney General

ANDREW M. CUOMO
Attorney General of the State of New York
120 Broadway, 25th Floor
New York, NY 10271
(212) 416-8016

Attorneys for New York State Respondents

* *Counsel of Record*

COUNTERSTATEMENT OF QUESTION PRESENTED

Whether the permit requirement of the federal Water Pollution Control Act, 33 U.S.C. § 1251 *et seq.* (the "Clean Water Act"), which places controls on pollutant discharges and is triggered by "any addition of any pollutant to navigable waters from any point source," applies when a point source conveys water containing pollutants from one distinct water body to another in circumstances where the receiving water body would not otherwise be burdened with additional pollutants but for the transfer through the point source.

TABLE OF CONTENTS

Page

COUNTERSTATEMENT OF QUESTION PRESENTED i

TABLE OF CONTENTS ii

TABLE OF CITED AUTHORITIES iii

STATEMENT 1

REASONS FOR DENYING THE PETITION 7

CONCLUSION 20

TABLE OF CITED AUTHORITIES

Page

CASES

Arkansas v. Oklahoma,
503 U.S. 91 (1992) 1

Catskill Mountains Chapter of Trout Unlimited, Inc. v. City of New York,
273 F.3d 481 (2d Cir. 2001) 4, 5, 6

Catskill Mountains Chapter of Trout Unlimited, Inc. v. City of New York,
451 F.3d 77 (2d Cir. 2006) 6

Committee to Save Mokelumne River v. East Bay Municipal Utility District,
13 F.3d 305 (9th Cir. 1993), *cert. denied*,
513 U.S. 873 (1994) 15

Del-AWARE Unlimited, Inc. v. Commonwealth of Pennsylvania Department of Environmental Resources,
508 A.2d 348 (Pa. Commw. Ct.),
appeal denied, 523 A.2d 1132 (Pa. 1986) 10

Dubois v. United States Department of Agriculture,
102 F.3d 1273 (1st Cir. 1996) 10, 13

Friends of the Everglades, Inc. v. South Florida Water Management District,
No. 02-80309-civ, 2006 WL 3635465 (S.D. Fla. Dec. 11, 2006) 9, 19

Cited Authorities

Page

Miccosukee Tribe of Indians v. South Florida Water Management District, 280 F.3d 1364 (11th Cir. 2002) *vacated and remanded*, 541 U.S. 95 (2004) 10, 12

Morris v. Weinberger, 410 U.S. 422 (1973) 8

National Cable & Telecommunications Association v. Brand X Internet Services, 125 S. Ct. 2688 (2005) 8

National Wildlife Federation v. Consumers Power Co., 862 F.2d 580 (6th Cir. 1988) 13, 14, 15

National Wildlife Federation v. Gorsuch, 693 F.2d 156 (D.C. Cir. 1982) 13, 14, 15

Northern Plains Resource Council v. Fidelity Exploration & Development Co., 325 F.3d 1155 (9th Cir.), *cert. denied*, 540 U.S. 967 (2003) 10, 11

People to Save the Sheyenne River, Inc. v. North Dakota Department of Health, 697 N.W.2d 319 (N.D. 2005) 10

Prosolino v. Nastri, 291 F.3d 1123 (9th Cir. 2002), *cert. denied*, 539 U.S. 926 (2003) 17

Cited Authorities

Page

PUD No. 1 v. Washington Department of Ecology,
511 U.S. 700 (1994) 16

Quinn v. Muscare,
425 U.S. 560 (1976) 8

Riverside Irrigation District v. Andrews,
758 F.2d 508 (10th Cir. 1985) 16

S.D. Warren Co. v. Maine Board of Environmental Protection,
126 S. Ct. 1843 (2006) 1, 15, 18

Skidmore v. Swift & Co.,
323 U.S. 134 (1944) 6

South Florida Water Management District v. Miccosukee Tribe of Indians,
541 U.S. 95 (2004) .....*passim*

United States v. Earth Sciences, Inc.,
599 F.2d 368 (10th Cir. 1979) 17

United States v. Law,
979 F.2d 977 (4th Cir. 1992), *cert. denied*,
507 U.S. 1030 (1993) 15

United States v. Mead Corp.,
533 U.S. 218 (2000) 9

Cited Authorities

Page

FEDERAL STATUTES

33 U.S.C. § 1251 ..... 1, 15, 19

33 U.S.C. § 1311 ..... 1, 2

33 U.S.C. § 1313 ..... 2, 3, 12

33 U.S.C. § 1314 ..... 16, 17

33 U.S.C. § 1315 2

33 U.S.C. § 1342 1

33 U.S.C. § 1362 ..... 1, 2

33 U.S.C. § 1370 16

FEDERAL REGULATIONS

40 C.F.R. § 122.1 1

40 C.F.R. § 122.44 ..... 2, 3

40 C.F.R. § 122.45 12

40 C.F.R. § 130.7 3

40 C.F.R. § 131.10 2

40 C.F.R. § 131.11 2

Page

STATE REGULATIONS

N.Y. Compilation of Codes Rules & Regulations, title 6 §§ 624.1-624.13 (2006) 19

MISCELLANEOUS

71 Fed. Reg. 32887 (June 7, 2006) (Pet. App. A171-A205) 17

United States Envornmental Protection Agency, Agency Interpretation on Applicability of Section 402 of the Clean Water Act to Water Transfers (Pet. App. A206-A237) 9

USEPA Website: Wetlands, Oceans & Watersheds

http://www.epa.gov/owow/tmdl/sediment/pdf/sediment.pdf 17

http://www.epa.gov/owow/tmdl/examples/sediment.html 17

STATEMENT

1. Congress adopted the Clean Water Act ("CWA" or "the Act") "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters." 33 U.S.C. § 1251(a). The national goal of the Act is "to achieve 'water quality which provides for the protection and propagation of fish, shellfish, and wildlife and provides for recreation in and on the water.'" *S.D. Warren Co. v. Me. Bd. of Envtl. Prot.*, 126 S.Ct. 1843, 1852 (2006) (quoting 33 U.S.C. § 1251(a)(2)). To serve these ends, the CWA prohibits the discharge of any pollutant by any person unless done in compliance with some provision of the CWA. 33 U.S.C. § 1311(a).

At issue here is the scope of the CWA's National Pollutant Discharge Elimination System ("NPDES") permit requirement, 33 U.S.C. § 1342(a), (b), which is the "primary means" for protecting and improving water quality within the "comprehensive regulatory regime" established by Congress. *Arkansas v. Oklahoma*, 503 U.S. 91, 99, 101 (1992). The NPDES requires a permit for the "discharge of any pollutant" from a "point source" into "navigable waters." 33 U.S.C. §§ 1311(a), 1342(a)-(b), 1362(6), (7), (12), (14); *see also* 40 C.F.R. § 122.1(b). "[D]ischarge of a pollutant" is defined in pertinent part as "any addition of any pollutant to navigable waters from any point source." 33 U.S.C. § 1362(12). "Point source," in turn, is defined as "any discernible, confined and discrete conveyance, including but not limited to any . . . tunnel . . . from which pollutants are or may be discharged." 33 U.S.C. § 1362(14). "The term 'pollutant' means dredged spoil, solid waste, incinerator residue, sewage, garbage, sewage sludge, munitions, chemical wastes, biological materials, radioactive materials,

heat, wrecked or discarded equipment, rock, sand, cellar dirt and industrial, municipal, and agricultural waste . . . ." 33 U.S.C. § 1362(6). "The term 'navigable waters' means the waters of the United States, including the territorial seas." 33 U.S.C. § 1362(7).

An NPDES permit sets forth the conditions for the discharge of pollutants consistent with various other provisions of the CWA, including the requirement that pollutant limitations be set so as to assure that each receiving water will achieve or continue to achieve the "water quality standards" applicable to the receiving water. 33 U.S.C. §§ 1311(b)(1)(C), 1313(a)-(c); 40 C.F.R. § 122.44(d)(1). "Water quality standards" consist of two major elements: (i) "the designated uses of the navigable waters involved"; and (ii) "the water quality criteria for such waters based upon such uses." 33 U.S.C. § 1313(c)(2)(A); 40 C.F.R. §§ 131.10, 131.11.

The United States Environmental Protection Agency ("EPA") or a delegated State must establish the designated use, "tak[ing] into consideration the use and value" of each water body "for public water supplies, protection and propagation of fish, shellfish and wildlife, recreation in and on the water, agricultural, industrial, and other purposes including navigation." 40 C.F.R. § 131.10(a). The CWA further requires States to assess their waters and identify individual waters that have not achieved compliance with water quality standards, despite controls contained in the applicable NPDES permit. 33 U.S.C. §§ 1313(d)(1)(A)-(B), 1315. For each noncompliant body, the EPA or delegated State must develop water pollution budgets and remedial pollutant loading allocations, known as "total maximum daily load[s]" ("TMDLs"), to identify both piped ("point") and

diffuse ("nonpoint") sources of excessive pollutants that cause the contravention of water quality standards. 33 U.S.C. § 1313(d)(1)(C), (D); 40 C.F.R. § 130.7. Once established, the pollutant loading reductions assigned to point sources in the TMDL process are generally incorporated as more stringent limitations within the relevant individual NPDES permits. 33 U.S.C. § 1313(d); 40 C.F.R. § 122.44(d)(1)(vii); *see S. Fla. Water Mgmt. Dist. v. Miccosukee Tribe of Indians*, 541 U.S. 95, 107 (2004).

2. As part of its system for delivering drinking water to New York City and the surrounding area, the City maintains the Schoharie Reservoir in the Catskill Mountains. Water is discharged from the Schoharie Reservoir, diverted through the 18-mile Shandaken Tunnel, and discharged into the Esopus Creek, a trout stream used for fly fishing and other recreational activities. Pet. App. A5-A6.[1] The Creek's water, in turn, flows through a series of reservoirs, aqueducts, and tunnels until it eventually reaches New York City. "Absent the man-made diversion through the [Shandaken] Tunnel, water from the Schoharie Reservoir would never reach the Esopus Creek." Pet. App. A6. "Because water in the Schoharie Reservoir contains suspended solids from both natural and man-made causes, discharges from the Tunnel into the Creek are more turbid than the waters of the Esopus." Pet. App. A26. "This turbidity impairs use of the Esopus for fly fishing and other recreational activities." Pet. App. A6. Also, "discharge from the Shandaken Tunnel periodically contains elevated temperatures that stress trout populations in Esopus Creek." Pet. App. A28.

---

[1] "Pet. App." refers to the Appendix to Petition for a Writ of Certiorari.

3. Catskill Mountains Chapter of Trout Unlimited, Inc. and other recreational users of the Esopus Creek ("Private Party Respondents") brought this citizens' suit alleging that Petitioners had violated the CWA by discharging pollutants into "waters of the United States" without an NPDES permit. Pet. App. A4.

The district court dismissed the complaint for failure to state a claim, holding that because there was no evidence that Petitioners "added anything to the water in the Reservoir before releasing it through the Shandaken tunnel," Private Party Respondents failed to establish that Petitioners' "diversion of water from the Schoharie Reservoir to Esopus Creek through the Shandaken tunnel constitutes an 'addition' of pollutants 'from' a point source." Pet. App. A38-A39.

The Court of Appeals reversed ("*Catskill Mountains I*"), holding that Petitioners' conveyance of water that contains pollutants from the Schoharie Reservoir through the 18-mile-long Shandaken Tunnel and into the Esopus Creek requires a permit. Pet. App. A60. It explained that "the transfer of water containing pollutants from one body of water to another, distinct body of water is plainly an addition and thus a 'discharge' that demands an NPDES permit." Pet. App. A71. The court rejected Petitioners' reliance on the cases involving the recirculation of water held back by a dam as factually distinguishable from this case because here, the Schoharie Reservoir and the Esopus Creek are hydrologically distinct and thus water and any pollutants from one are an "addition" to the other; in contrast, in the dam context, water is taken from a water source and released back into that same source, and thus the water and pollutants are not an "addition." Pet. App. A71-A73. The court analogized the "dams cases" to pouring a ladle of soup back into the same pot, in which

case "one has not 'added' soup or anything else to the pot." Pet. App. A72.

The Court of Appeals also rejected Petitioners' "singular entity" theory of navigable waters, which posits that "an addition to one water body is deemed an addition to all of the waters of the United States." Pet. App. A75.

> Such a theory would mean that movement of water from one discrete water body to another would not be an addition even if it involved a transfer of water from a water body contaminated with myriad pollutants to a pristine water body containing few or no pollutants. Such an interpretation is inconsistent with the ordinary meaning of the word "addition."

Pet. App. A75. Finally, the court rejected Petitioners' arguments from the CWA's broad purposes and structure: "Where a statute seeks to balance competing policies, congressional intent is not served by elevating one policy above the others, particularly where the balance struck in the text is sufficiently clear to point to an answer." Pet. App. A76.

On remand from *Catskill Mountains I*, the district court granted partial summary judgment for Respondents with respect to liability and, after a bench trial, imposed civil penalties and ordered Petitioners to seek a permit promptly. Pet. App. A83, A118, A122. The court joined State Respondents as third-party defendants and ordered them to process the permit application in a timely fashion. Pet. App. A122.

On appeal from the district court's remedial order, Petitioners challenged the amount of the civil penalty and sought to reargue liability. On June 13, 2006, the Court of Appeals reiterated its holding from *Catskill Mountains I* that an NPDES permit is required for the interbasin transfer of polluted water under the plain language of the CWA. Pet. App. A23 ("*Catskill Mountains II*"). The court rejected Petitioners' argument that a different result was required by this Court's decision in *Miccosukee*, 541 U.S. at 109-10, because in *Miccosukee*, the Court did not eliminate the distinction between inter- and intrabasin transfers, and even cited with approval the Second Circuit's "soup ladle" analogy. Pet. App. A12. Nor did the Court of Appeals find persuasive, applying the degree of deference appropriate under *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944), the 2005 EPA interpretation cited by Petitioners concluding that the NPDES permit requirement is inapplicable to interbasin water transfers. Pet. App. A12-A15 & n.5; *see also* Pet. App. A205-A237. Finally, the court found Petitioners' "plea for reconsideration" based on the assumption that regulating the discharge "would effectively require that the flow be stopped altogether" to be "exaggerated." Pet. App. A16. The court provided a "detailed and technical accounting" of the flexibility built into the NPDES permit scheme. Pet. App. A16-A19.

Petitioners' request for rehearing and rehearing *en banc* was denied on August 25, 2006. Pet. App. A141.

4. On June 7, 2006, the EPA issued a Notice of Proposed Rulemaking embodying the legal analysis in the EPA's 2005 legal memorandum. Pet. App. A182. As of this date, the EPA has not acted to finalize the Proposed Rule.

5. Effective September 1, 2006, Respondent New York State Department of Environmental Conservation ("DEC") issued a CWA permit to the New York City Department of Environmental Protection with respect to the discharge from the Shandaken Tunnel into the Esopus Creek. Pet. 13.[2] *See* N.Y. State Dep't of Envtl. Conservation, *State Pollutant Discharge Elimination System Discharge Permit*, No. NY-0268151 ("SPDES Permit"). Petitioners have not challenged any aspect of this permit.

REASONS FOR DENYING THE PETITION

The Court of Appeals correctly held that interbasin transfers of polluted water require a permit under the CWA, and that decision does not warrant this Court's review. Petitioners seek a writ of certiorari to correct a supposed error in interpreting the CWA, despite acknowledging that the EPA – the agency charged with interpreting the Act – has initiated rulemaking on the very topic of whether water transfers are subject to the CWA permitting process. There is thus a distinct possibility that any decision by this Court would be called into question following publication of a final rule. Nor do Petitioners identify a circuit conflict or any other reason to invoke this Court's jurisdiction. The Second Circuit's decision is fully consistent with those of this Court, the First, Ninth, and Eleventh Circuits, as well as the two state appellate courts to have addressed the question. In the face of this consistent body of case law, Petitioners argue that this case merits review because of its unique factual context – the movement of water for drinking, as opposed to for commercial or industrial use. Pet. 15. Petitioners present a factual distinction without legal significance.

---

[2] "Pet." refers to the Petition for a Writ of Certiorari.

1. Petitioners seek to support their request for review by pointing to the EPA's proposal to exempt interbasin transfers from the NPDES permit requirement, but the fact that the regulatory setting for this case is in flux is a primary reason to *deny* review here. While the proposed rule was published on June 7, 2006, and the comment period closed July 24, 2006, a final rule is still pending. Pet. App. A171. If a final rule issues at all, the rule itself or its legal rationale may be substantially revised as the rulemaking process moves forward. This change could occur during, or even after, Court review. It would be premature for the Court to accept review of this case on the promise of a regulatory change that may not materialize.

Moreover, if the EPA does complete formal notice and comment rulemaking, certiorari review of this case may turn out to be futile because a decision by the Court interpreting the scope of the CWA permitting process could be supplanted, or at least called into question, by the formal agency rule. *See Nat'l Cable & Telecomm. Ass'n v. Brand X Internet Servs.*, 125 S.Ct. 2688, 2700 (2005). Given the prospect of formal agency action, prudential principles of judicial economy make this case a particularly poor vehicle for certiorari. *Cf. Quinn v. Muscare*, 425 U.S. 560, 563 (1976) (writ of certiorari dismissed due to, inter alia, a subsequent change in the challenged municipal regulation); *Morris v. Weinberger*, 410 U.S. 422, 422 (1973) (writ of certiorari dismissed due to congressional amendment of relevant statutory provisions); *see also Brand X*, 125 S.Ct. at 2719-20 (Scalia, J., dissenting) (discussing the unseemliness of a Supreme Court decision being overruled by an agency acting through formal rulemaking).

Finally, the Court of Appeals did not depart from routine application of established agency deference principles, as Petitioners repeatedly suggest. *See* Pet. i, 4, 14, 27-30. The proposed rule was issued by the EPA some six months after this matter was argued and submitted to the Second Circuit, and a week before the court rendered its decision. Pet. App. A2, A171. While the court did not specifically address that eleventh-hour preliminary rulemaking, it did discuss the August 5, 2005, agency interpretation on which the proposed rule was based. Pet. App. A181-A182; A205-A237 ("Agency Interpretation on Applicability of Section 402 of the Clean Water Act to Water Transfers"). The court reviewed the agency interpretation, Pet. App. A12-A15, correctly applied *Skidmore* deference as Petitioners conceded, Pet. App. A11, and held that "we do not find the argument persuasive and therefore decline to defer to EPA." Pet. App. A12 n.5. Because neither the proposed rule nor the agency interpretation are embodied in final, formal notice and comment rulemaking, neither is entitled to more than *Skidmore* deference. *See United States v. Mead Corp.*, 533 U.S. 218, 227-38 (2000). Finally, the Court of Appeals had the opportunity to consider the proposed rule, upon Petitioners' invitation to rehear the case.[3]

2. This petition presents no conflict with any decision of this Court nor any split of authority among the circuits. Every court to consider the issue has agreed with the Court

[3] The only other court to have reviewed the EPA's proposed rule and agency interpretation rejected them (and held that an interbasin transfer required a NPDES permit) on the grounds that the EPA's positions were inconsistent with the "unambiguous" terms of the CWA. *Friends of the Everglades, Inc. v. S. Fla. Water Mgmt. Dist.*, No. 02-80309-civ, 2006 WL 3635465, at *34-*36, *42-*48 (S.D. Fla. Dec. 11, 2006).

of Appeals in this case. *See Dubois v. United States Dep't of Agric.*, 102 F.3d 1273, 1296-99 (1st Cir. 1996); *N. Plains Res. Council v. Fid. Exploration & Dev. Co.*, 325 F.3d 1155, 1163 (9th Cir.), *cert. denied*, 540 U.S. 967 (2003); *Miccosukee*, 280 F.3d 1364, 1368-69 (11th Cir. 2002), *vacated and remanded*, 541 U.S. 95 (2004).[4]

a. No court has ever held that the transfer of pollutants from one distinct body of water to another is exempt from the NPDES permit requirement. In *Dubois*, a First Circuit case, a ski area sought to pump water from the East Branch of the Pemigewasset River up into Loon Pond, a high-altitude water body considered to be "unusual for its relatively pristine nature" and which served as a drinking water supply. 102 F.3d at 1277-78. New Hampshire classified Loon Pond "as a Class A waterbody, protected by demanding water quality standards under a variety of criteria." *Id.* The East Branch, by contrast, was "a relatively unprotected Class B waterway." *Id.* at 1279. The First Circuit took judicial notice that for years the East Branch was "one of the most polluted rivers in New England." *Id.* at 1297. Because East Branch water, which otherwise would not have flowed into Loon Pond, *id.* at 1297, contained "bacteria, other aquatic organisms such as Giardia lambia, phosphorus, turbidity and heat," *id.* at 1278, the First Circuit held that an NPDES permit was required for the transfer, *id.* at 1296-99. The court

[4] The state appellate courts that have reviewed this issue have reached the same conclusion as did the Court of Appeals in this case. *See Del-AWARE Unlimited, Inc. v. Commonwealth of Pa. Dep't of Envtl. Res.*, 508 A.2d 348, 359 (Pa. Commw. Ct.), *appeal denied*, 523 A.2d 1132 (Pa. 1986); *cf. People to Save the Sheyenne River, Inc. v. North Dakota Dep't of Health*, 697 N.W.2d 319, 323-25 (N.D. 2005) (holding that a state-issued NPDES permit for the interbasin transfer of polluted water must comply with various provisions of the CWA).

concluded that "[t]he proposed transfer of water from one [body of water] to the other constitutes an 'addition.'" *Id.* at 1299. The EPA itself issued an NPDES permit in response to *Dubois*. Pet. App. A208 n.4.

In *Northern Plains*, a company extracted methane gas and, in the process, drew large quantities of deep groundwater to the surface. 325 F.3d at 1158. The company did not add any chemicals to the groundwater before dumping it into the Tongue River. *Id.* In its "natural state," however, the water contained suspended solids, calcium, magnesium, sodium, potassium, bicarbonate, carbonate, sulfate, chloride, fluoride, aluminum, arsenic, barium, beryllium, boron, copper, lead, iron, manganese, strontium, and radium. *Id.* Further, the groundwater was "salty," raising concerns by those using the Tongue River for agricultural irrigation that the salt would break down the soil structure on farms and ranches. *Id.* The Ninth Circuit held that an NPDES permit was required under the "plain language" of the CWA. *Id.* at 1160.

> Were we to conclude otherwise, and hold that the massive pumping of salty, industrial waste water into protected waters does not involve discharge of a 'pollutant,' even though it would degrade the receiving waters to the detriment of farmers and ranchers, we would improperly undermine the integrity of [the CWA's] prohibitions.

Id. at 1162 (internal quotation marks omitted).

The Eleventh Circuit in *Miccosukee* similarly held that the transfer of polluted water from one distinct water body into another would constitute an addition that triggers the

CWA's permit requirement. 280 F.3d at 1366, 1368-69; *see also id.* at 1368 n.5. This Court subsequently reversed summary judgment and remanded for further fact finding on whether the bodies of water at issue – a drainage canal and an impoundment area in the Everglades – are really two distinct bodies of water, or are instead two parts of the same water body. *Miccosukee*, 541 U.S. at 112. Here, all parties agree that the Schoharie Reservoir and Esopus Creek are hydrologically distinct water bodies. The decision below, therefore, is fully consistent with this Court's opinion in *Miccosukee*.

This Court in *Miccosukee* declined to rule on the South Florida Water Management District's so-called "unified waters" (or "singular entity") theory of navigable waters because it had not been raised below. *Id.* at 109. The theory, also pressed by Petitioners here as a reason to grant certiorari (Pet. 17-19 & nn.13-15), posits that all waters of the United States are a unified whole that may be freely mixed without NPDES implications. *See Miccosukee*, 541 U.S. at 105-09. While not deciding the issue, the Court in *Miccosukee* did raise a number of pointed concerns about this theory. The Court questioned whether it would be proper to place a water transfer from a "polluted" water body to one that is "pristine" outside the scope of the NPDES program, *id.* at 106, as well as whether this legal theory is valid in light of NPDES provisions of the CWA that appear to "protect[] individual water bodies as well as the 'waters of the United States' as a whole," *id.* at 107 (citing 33 U.S.C. §§ 1313(c)(2)(A), 1313(d)). *Miccosukee* also discussed one EPA-promulgated NPDES regulation that "appears to address the movement of pollutants among water bodies, at least at times." *Id.* at 107-08 (citing 40 C.F.R. § 122.45(g)(4)).

The United States originally presented its "unitary waters" theory to the *Miccosukee* Court in a brief *amicus curiae*, *id.* at 105-06, and represented that its approach was the "longstanding EPA view," *id.* at 107. The Court was unpersuaded on this point,[5] and notably, the EPA did not rely on the theory in its subsequent interpretation and rulemaking on water transfers. Pet. App. A171-A204, A205-A237. Considering the skepticism expressed by this Court as to both the substance and the pedigree of the "unitary waters" theory, the fact that no court has adopted the theory and a number have rejected it,[6] and that the United States itself seems to have abandoned it, it can hardly be considered an issue worthy of this Court's attention.

b. The "dams cases" relied upon by Petitioners are not in conflict with this case. Pet. App. A8-A9, A11, A71-A73. These cases, *National Wildlife Federation v. Gorsuch*, 693 F.2d 156 (D.C. Cir. 1982), and *National Wildlife Federation v. Consumers Power Co.*, 862 F.2d 580 (6th Cir. 1988), held that discharges of water containing pollutants from dams which re-circulated the same water into the same water body through a pump storage facility or sent water down stream within the same watershed did not require an NPDES permit. A key premise of the *Gorsuch* and *Consumers Power* decisions was the "sameness" of the water and water body – as in something may not be "added" to itself – a premise that may not reasonably be stretched to encompass polluted water transfers between

[5] The *Miccosukee* Court noted that the Department of Justice had failed to "identify any administrative documents in which EPA has espoused that position." 541 U.S. at 107. Further, the Court remarked that an *amicus* brief filed by several former EPA officials had argued "that the agency once reached the opposite conclusion." *Id.*

[6] *See, e.g., Dubois*, 102 F.3d at 1296-97 (rejecting the singular entity theory).

completely distinct water bodies. Pet. App. A71-A73. The Court of Appeals in *Catskill Mountains II* expounded the important distinction between the intrabasin transfers in the dams cases and the interbasin transfers at issue here:

> [*Gorsuch* and *Consumers Power*] held that water taken from a water source and then released back into that same source was not an "addition" to navigable waters under the CWA, despite the fact that the water so released contained "pollutants." This case differed from the dams cases . . . because the Tunnel discharges water into the Creek from a source that is a different, distinct body of water . . . . [W]e analogized the dams cases to a soup ladle scooping soup out of a pot and returning it to that pot, a type of water transfer known as an intrabasin transfer. The Tunnel's discharge, in contrast, was like scooping soup from one pot and depositing it in another pot, thereby adding soup to the second pot, an interbasin transfer.

Pet. App. A8-A9 (citations omitted). As the court further explained, "despite the presence of pollutants in both interbasin and intrabasin transfers, interbasin transfers are properly distinguished [from those in *Gorsuch* and *Consumers Power*] because they 'add' pollutants to the navigable waters." Pet. App. A11.

The Court in *Miccosukee* did not discuss or cite the dams cases, indicating their lack of relevance to the question of whether NPDES permits are required for interbasin transfers. The *Miccosukee* Court, however, did favorably cite the

Catskill Mountains I "soup ladle" analogy and the distinction between inter- and intrabasin transfers. 541 U.S. at 109-10. The Court remanded the case to the district court to determine whether the water bodies in question were "two pots of soup, not one." *Id.* at 112; *cf. S.D. Warren*, 126 S.Ct. at 1850 n.6. This remand would be unnecessary if there were no legally significant distinction between inter- and intrabasin transfers.

The important distinctions between inter- and intrabasin transfers recognized by both *Miccosukee* and the court below completely undercut Petitioners' reliance on *Gorsuch* and *Consumers Power* for a circuit split.[7] In fact, the EPA itself, in its agency interpretation, was careful to distinguish between inter- and intrabasin transfers. *See* Pet. App. A235 n.18.

c. Petitioners' remaining legal contentions similarly amount to no more than a series of requests for individualized error correction, and with respect to these, too, the decision of the Court of Appeals is entirely consistent with the precedent of this and other courts. For example, Petitioners assert, Pet. 22-27, that the court below erred when it held that a provision of the CWA with respect to state allocations of *quantities* of water does not obviate the NPDES permit requirement with respect to water *quality*. Pet. App. A13-A14; *see* 33 U.S.C. § 1251(g). Petitioners also cite to a provision of the CWA which provides that nothing in the

[7] Petitioners wrongly imply, Pet. 18, that a conflict arises from *United States v. Law*, 979 F.2d 977, 978 (4th Cir. 1992), *cert. denied*, 507 U.S. 1030 (1993), and *Committee to Save Mokelumne River v. East Bay Municipal Utility District*, 13 F.3d 305, 307 (9th Cir. 1993), *cert. denied*, 513 U.S. 873 (1994). These cases merely held that an NPDES permit is required for the discharge of mine wastes from a waste detention impoundment to a creek.

Act should impair any right of the "States with respect to the waters . . . of such States." 33 U.S.C. § 1370(2). The Second Circuit's decision is, however, consistent with the holdings of this Court and the one other circuit to address this issue. In *PUD No. 1 v. Washington Department of Ecology*, this Court held that "[s]ections 101(g) [33 U.S.C. § 1251(g)] and 510(2) [33 U.S.C. § 1370(2)] preserve the authority of each State to allocate water quantity as between users; they *do not limit the scope of water pollution controls that may be imposed on users who have obtained, pursuant to state law, a water allocation.*" 511 U.S. 700, 720 (1994) (emphasis added); *see also Riverside Irrigation Dist. v. Andrews*, 758 F.2d 508, 513 (10th Cir. 1985) ("[W]here both the state's interest in allocating water and the federal government's interest in protecting the environment are implicated, Congress intended an accommodation. Such accommodations are best reached in the individual permit process."). Putting aside the fact-bound state law issue of whether an "allocation" even exists here, there is no conflict among the courts on this legal issue.[8]

Similarly, Petitioners assert error on the part of the court below due to its holding, Pet. App. A14, that a provision of the CWA dealing with nonpoint pollution, 33 U.S.C. § 1314(f)(2), does not limit the NPDES requirement as it relates to point source discharges. Pet. 21-22. The Second Circuit's position, however, is consistent with the holding of this Court in *Miccosukee* that "§ 1314(f)(2)(F) does not

[8] Petitioners seek to distinguish between interbasin transfers that involve drinking water and polluted water transfers for other purposes. Pet. 15. As they did before the court below, however, Petitioners provide no explanation under the CWA, or any other statute, as to why the NPDES program would treat transfers involving drinking water differently from any other water transfers. *See* Pet. App. A15.

explicitly exempt nonpoint pollution sources from the NPDES program if they *also* fall within the 'point source' definition" of the CWA. 541 U.S. at 106. Similarly, in *United States v. Earth Sciences, Inc.*, 599 F.2d 368, 373 (10th Cir. 1979), the Tenth Circuit held that § 1314(f)(2) does not create nonpoint source exemptions from the Act's NPDES requirement: "Mining and other categories listed in § 1314(f)(2) may involve discharges from both point and nonpoint sources, and those from point sources are subject to regulation." Indeed, the EPA admits that "[m]ere mention of an activity in section 304(f) [33 U.S.C. § 1314(f)] does not mean it is exclusively nonpoint source in nature." 71 Fed.Reg. 32887, 32890 (June 7, 2006) (citing *Miccosukee*, 541 U.S. at 106).[9] Thus, there is no conflict here either.[10] And one circuit court has specifically approved a TMDL pollutant reduction budget for sediment that was developed by the EPA pursuant to the CWA. *See Prosolino v. Nastri*, 291 F.3d 1123, 1126-27, 1129-30 (9th Cir. 2002), *cert. denied*, 539 U.S. 926 (2003).

Petitioners also make the perplexing assertion that the Court of Appeals "ignored the plain language of the statute,"

[9] Pet. App. A185 inaccurately quotes this language from the Federal Register.

[10] Petitioners also assert that turbidity and sediment are not "pollutants" under the CWA. Pet. 20. This issue, however, was not presented to the court below and, thus, cannot serve as a basis for a grant of certiorari. See Pet. App. A6 n.1 ("The parties do not contest that turbidity qualifies as a pollutant under the CWA."). In any event, Petitioners' assertion is not only meritless, but absurd. The EPA has developed an entire protocol on how to establish sediment TMDLs under the CWA, *see http://www.epa.gov/owow/tmdl/sediment/pdf/sediment.pdf* (last visited Jan. 25, 2007), and has listed numerous examples of EPA-approved TMDLs for water bodies impaired by sediment pollution, *see http://www.epa.gov/owow/tmdl/examples/sediment.html* (last visited Jan. 25, 2007).

Pet. 21, even though both decisions below were expressly based on the plain text of the CWA and, in particular, the meaning of the term "addition." Pet. App. A15, A73. Indeed, the Court of Appeals' method of statutory construction was fully consistent with that recently undertaken by this Court when interpreting terms from the CWA that are "neither defined in the statute nor a term of art" so that they are given their "ordinary or natural meaning." *S.D. Warren*, 126 S.Ct. at 1847 (interpreting "discharge" in the CWA according to its "ordinary or natural meaning").

3. Finally, Petitioners assert that review is appropriate because the Second Circuit's decision will "wreak havoc" on traditional water management functions. Pet. 14, 25-27. After carefully reviewing similar claims raised by Petitioners below, the Court of Appeals correctly called them "exaggerated," and "alarmist and unwarranted." Pet. App. A16, A18. The NPDES permitting process contains flexible administrative mechanisms and variance procedures to assure that important water transfers occur as measures to appropriately control pollutant discharges are implemented. Pet. App. A16-A18. To the extent there is any basis for Petitioners' generalized concerns, they are best addressed within the individualized permitting process itself, as was done here.

As the Court of Appeals concluded after a detailed examination of this issue: "We think the flexibility built into the CWA and the NPDES permit scheme . . . will allow federal authority over quality regulation and state authority over quantity allocation to coexist without materially impairing either." Pet. App. A16. Indeed, DEC issued a CWA permit to Petitioners for the Shandaken Tunnel discharge, Pet. 13, and while Petitioners had an opportunity to challenge

the terms of the permit as overly burdensome, either administratively or in state court, they did not do so. *See* N.Y. Comp. Codes R. & Regs. tit. 6, §§ 624.1-624.13 (2006). Rather, the only challenge came from the Private Party Respondents, who claimed the permit was too permissive. It seems that Petitioners' only real complaint with the permitting process is the fear that the exemption that they now benefit from might someday be taken away. The time to complain about that eventuality, however, is if and when it comes to pass.

In addition, this Court itself recognized Pennsylvania's long-standing NPDES program to regulate all interbasin transfers. 541 U.S. at 108-09. And the one other court to specifically address the issue of permit flexibility in this context squarely agreed with the Second Circuit. *See Friends of the Everglades*, 2006 WL 3635465, at *46.

For their part, the Petitioners make no effort to review the adverse impacts associated with certain interbasin transfers of water containing pollutants: Salt water could be transferred into fresh water; sediment-laden water could be sent into clear drinking water reservoirs; warm waters could be pumped into cold water habitats; chemical laden waters could be dumped into waters employed in farm and ranch irrigation; and invasive species could be transferred into waters not yet infested. Petitioners do not explain how leaving such transfers unregulated by NPDES permits would be consistent with the fundamental "objective" of the CWA "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters," 33 U.S.C. § 1251(a).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

ANDREW M. CUOMO
Attorney General of the
State of New York
BARBARA D. UNDERWOOD*
Solicitor General
MICHELLE ARONOWITZ
Deputy Solicitor General
JAMES M. TIERNEY
Assistant Attorney General
120 Broadway, 25th Floor
New York, NY 10271
(212) 416-8016

Attorneys for New York State
Respondents

* *Counsel of Record*

(6)

No. 06-729

Supreme Court, U.S.
FILED
JAN 26 2007
OFFICE OF THE CLERK

In The Supreme Court of the United States

CITY OF NEW YORK, et al.,

Petitioners,

v.

CATSKILL MOUNTAINS CHAPTER OF TROUT UNLIMITED, et al.,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit

BRIEF *AMICUS CURIAE* OF THE AMERICAN PUBLIC WORKS ASSOCIATION, THE AMERICAN WATER WORKS ASSOCIATION, THE ASSOCIATION OF METROPOLITAN WATER AGENCIES, THE NATIONAL ASSOCIATION OF CLEAN WATER AGENCIES, THE NATIONAL LEAGUE OF CITIES, AND THE NEW YORK CONFERENCE OF MAYORS IN SUPPORT OF PETITIONERS

ALEXANDRA D. DUNN
General Counsel, NATIONAL ASSOCIATION OF CLEAN WATER AGENCIES
1816 Jefferson Place, NW
Washington, DC 20036
(202) 533-1803

DAVID W. BURCHMORE*
SQUIRE, SANDERS & DEMPSEY L.L.P.
4900 Key Tower
127 Public Square
Cleveland, OH 44114
(216) 479-8500

**Counsel of Record*

[Additional Counsel Listed Inside Front Cover]

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

KENNETH A. RUBIN
MORGAN, LEWIS & BOCKIUS LLP
1111 Pennsylvania Avenue, NW
Washington, DC 20004
(202) 739-5140
Counsel for the American Water Works Association

DONNA M. GILIBERTO
General Counsel
NEW YORK CONFERENCE OF MAYORS
119 Washington Avenue
Albany, NY 12210
(518) 463-1185

CAROLYN COLEMAN, ESQ.
Director, Federal Relations
NATIONAL LEAGUE OF CITIES
1301 Pennsylvania Avenue, NW
Washington, DC 20004
(202) 626-3023

TABLE OF CONTENTS

	Page
INTERESTS OF THE *AMICI*	1
STATEMENT OF THE CASE	5
SUMMARY OF THE ARGUMENT	5
ARGUMENT	7
I. CLEAN WATER ACT § 101(g) PROHIBITS THE RESULT REACHED BY THE COURT BELOW	7
A. Purpose of The Wallop Amendment	7
B. NPDES Permits Must Require Strict Compliance with Water Quality Standards Without Regard to Feasibility or Cost	11
II. THE NPDES PROGRAM WAS NOT INTENDED TO APPLY TO INTER-BASIN TRANSFERS AND DIVERSIONS OF UNTREATED WATER FOR PUBLIC PURPOSES	13
A. Congress Did Not Intend to Apply the NPDES Permit Program to Transfers and Diversions of Untreated Water	14
B. More Appropriate Regulatory Mechanisms Exist Under Federal and State Law for Addressing Diversions of Untreated Water	14
1. Total Maximum Daily Loads and State Water Quality Management Plans	15
2. Municipal Separate Storm Sewer System Permits	16

TABLE OF CONTENTS – Continued

Page

3. The Safe Drinking Water Act and Surface Water Treatment Rule 17

4. State Laws and Regulations 18

CONCLUSION 20

TABLE OF AUTHORITIES

Page

CASES

Ackels v. EPA, 7 F.3d 862 (9th Cir. 1993) 12

Catskill Mountains Chapter of Trout Unlimited, Inc. v. City of New York, 273 F.3d 481 (2nd Cir. 2001) ..... *passim*

Defenders of Wildlife v. Browner, 197 F.3d 1035 (9th Cir. 1999) 12

Oklahoma v. EPA, 908 F.2d 595 (10th Cir. 1990) 12

Natural Resources Defense Council, Inc. v. EPA, 966 F.2d 1292 (9th Cir. 1992) .....

National Wildlife Federation v. Consumers Power, 862 F.2d 580 (6th Cir. 1988) 14

National Wildlife Federation v. Gorsuch, 693 F.2d 156 (D.C. Cir. 1982) 9, 14

Riverside Irrigation District v. Andrews, 758 F.2d 508 (10th Cir. 1985) 10

South Florida Water Management District v. Miccosukee Tribe of Indians, 541 U.S. 95 (2004) ..... *passim*

STATUTES

33 U.S.C. § 1251(g) [CWA § 101(g)] 6, 7, 9, 19

33 U.S.C. § 1313(d) [CWA § 303(d)] 15

33 U.S.C. § 1314(f)(2)(F) [CWA § 304(f)(2)(F)] 6, 14

33 U.S.C. § 1329 [CWA § 319] 15, 16

33 U.S.C. § 1342 [CWA § 402] 12, 16

33 U.S.C. § 1370 8

42 U.S.C. § 300(f) 17

TABLE OF AUTHORITIES – Continued

Page

REGULATIONS

40 C.F.R. § 122.44(d) 12

40 C.F.R. § 130.6(c) 16

40 C.F.R. § 130.7(a) 16

40 C.F.R. § 141.70 17

40 C.F.R. § 141.71 17

40 C.F.R. § 141.171 17

LEGISLATIVE MATERIALS

A Legislative History of the Clean Water Act of 1977 (committee print compiled for the Committee on Environment and Public Works by the Library of Congress), Ser. No. 95-14 (1978) 8

STATE REGULATIONS

New York State Environmental Conservation Law

ECL § 15-0801 18

ECL § 15-0805 18

ECL § 17-0501 18

ECL § 17-0505 18

ECL § 17-1501 18

N.Y. Comp. Codes R. & Regs., tit. 6

Part 670 19

Part 670.1 19

Part 670.3 19

TABLE OF AUTHORITIES – Continued

Page

OTHER

Caher, "NYC Ordered to Pay $6M Penalty for Polluting Water," *New York Law Journal* (Feb. 7, 2003) 11

BRIEF OF THE AMERICAN PUBLIC WORKS ASSOCIATION, THE AMERICAN WATER WORKS ASSOCIATION, THE ASSOCIATION OF METROPOLITAN WATER AGENCIES, THE NATIONAL ASSOCIATION OF CLEAN WATER AGENCIES, THE NATIONAL LEAGUE OF CITIES, AND THE NEW YORK CONFERENCE OF MAYORS AS *AMICI CURIAE* IN SUPPORT OF PETITIONER[1]

INTERESTS OF THE *AMICI*

The undersigned *amici curiae* represent a broad spectrum of local governments, public utilities, water suppliers, and local water management agencies. *Amici* all have direct roles in ensuring clean and safe water in our country. However, *amici* also have an interest in ensuring that suitable laws and regulations apply to their activities, and believe that the Second Circuit's ruling impermissibly interferes with local water management decisions.

Transfers and natural, untreated water play a key role in the design and operation of municipal water and flood control systems as well as in structures designed to assist in inland navigation. Countless water management systems throughout the country transfer water to areas that need it, or away from areas in danger of flooding. Operation of canals, locks, and other structures involves movement of water from one body – whether natural or constructed – to others. The Second Circuit's decision threatens the operation of all such systems and is inconsistent with the language and intent of the Clean Water Act (CWA).

---

[1] Pursuant to Rule 37.6 of this Court, *amici* represent that counsel for *amici* authored this brief in its entirety and that no person or entity other than *amici* and their representatives made any monetary contribution to the preparation or submission of this brief.

The Second Circuit's decision would radically change the existing regulatory structure for local governments and other water management authorities by holding that inter-basin transfers of untreated water, in the context of routine water management activities, can only be authorized and managed by National Pollutant Discharge Elimination System (NPDES) permits. Virtually none of the millions of dams, levees, aqueducts, canals, and other structures used by the federal, state, and local governments and public utilities for ordinary management of water, for public water supply, flood control, navigation, and other governmental and public purposes, currently operates pursuant to such a federal permit. There is no indication in the language or history of the CWA that Congress intended the new law to apply to or to interfere with these structures' basic functions and historic operations.

The American Public Works Association (APWA) is an international educational and professional association of public agencies, private sector companies, and individuals dedicated to providing high quality public works goods and services. Originally chartered in 1937, APWA is the largest and oldest organization of its kind in the world, with 67 chapters throughout North America. APWA provides a forum in which public works professionals can exchange ideas, improve professional competency, increase the performance of their agencies and companies, and bring important public works-related topics to public attention in local, state and federal arenas. Working in the public interest, the 28,500 members of APWA design, build, operate and maintain transportation, water supply, sewage, and refuse disposal systems, public buildings and other structures and facilities essential to our nation's economy and way of life.

The American Water Works Association (AWWA) is the largest and oldest association of water professionals in the world. With over 60,000 members, it represents the full

spectrum of the water community, including utilities, individual members, consulting firms, manufacturers, academics, and environmental advocates. Its utility members represent both public and private utilities, from the nation's largest to the very smallest. Collectively, AWWA's utility members serve drinking water to about 80 percent of the American population.

The Association of Metropolitan Water Agencies (AMWA) represents the nation's largest publicly-owned municipal drinking water suppliers. AMWA's members include agencies and divisions of city governments, and special purpose commissions, districts, agencies and authorities created under state law to supply drinking water to the public. AMWA's members provide drinking water to over 110 million people throughout the country. Many AMWA member agencies own or operate lakes, reservoirs, dams, aqueducts, tunnels, pipelines and other conveyances in and through which source waters are collected, stored, moved and otherwise managed as part of their mission to supply adequate supplies of drinking water to the populations they serve. Water management activities in the facilities of many AMWA members involve transfers from one water source or body to another. AMWA is concerned that the Second Circuit's decision will have a particularly devastating effect in western states, whose water supply networks often rely on engineered transfers among various natural water bodies.

The National Association of Clean Water Agencies (NACWA) represents the nation's publicly-owned wastewater treatment agencies (POTWs). NACWA's nearly 300 member agencies provide the majority of the U.S. population with reliable sewer service and collectively treat and reclaim over 18 billion gallons of wastewater each day. NACWA members operate their POTWs under the CWA's NPDES permitting program. NACWA members are concerned, however, that the Second Circuit's decision

unnecessarily will subject new aspects of their operations to NPDES permitting for the first time.

The National League of Cities (NLC) is the oldest and largest national organization representing municipal governments throughout the United States. NLC serves as a national resource and advocate on behalf of over 1,800 member cities and for 49 state municipal leagues whose membership totals more than 18,000 cities and towns across the country. The specific interest of the NLC in this case lies in the fact that municipal governments have historic authority and responsibilities to protect public safety and the health of their citizens in the management of their resources. NLC is particularly concerned that, because this Court has not yet ruled directly on the central issue in this case, the conflict between the U.S. Environmental Protection Agency's (U.S. EPA's) historical position and the ruling of the Second Circuit leaves cities and other water management agencies in such a position of uncertainty that it is impossible to move forward with planning for vital water management programs.

The New York Conference of Mayors (NYCOM) is a not-for-profit, voluntary membership association consisting of 567 of the State's 616 cities and villages, thereby representing the overwhelming majority of such municipalities. NYCOM's mission is to improve the administration of municipal affairs in New York State through training for municipal officials, and to provide its members with legislative advocacy at both the state and federal levels on issues of concern to local government. This case is of significant concern to all NYCOM members as they each have a direct role in ensuring clean and safe water, an interest in ensuring that suitable laws and regulations apply to their activities, and belief that the lower court's ruling impermissibly interferes with local water management decisions. The decision of the court below will have a disastrous effect on the finances of cities and villages in the State of New York, as it will require them to obtain

NPDES permits for similar water transfers and subject them to excessive penalty assessments and inconsistent enforcement actions by EPA and the courts.

STATEMENT OF THE CASE

Amici adopt the statement of the case contained in the *Petition for Writ of Certiorari*.

SUMMARY OF THE ARGUMENT

The Second Circuit's decision would burden tens of thousands of water authorities and municipal water departments and agencies with unnecessary, and in many cases unattainable, regulatory requirements. Due to the complete unsuitability of the NPDES program to these water management activities, in perhaps the majority of cases, local water management agencies would be unable to obtain or comply with NPDES permits for facilities that are essential to meeting many public health and safety needs, including flood control; ensuring a reliable supply of water for domestic, commercial, and industrial uses; and fire suppression.

Municipal and regional water management systems operated in the United States for decades before the 1972 enactment of the CWA. These systems are designed to move water from one body to another, or to change the flow of water. During the 30-plus years since its enactment, the CWA has never, until recently, been interpreted to regulate such transfers and diversions of untreated water. U.S. EPA has never required that such transfers and diversions operate pursuant to CWA NPDES permits. The NPDES permit program is the wrong tool to regulate water transfers and diversions, and the consequences of requiring NPDES permits for such activities will be devastating to water suppliers, local governmental water managers, and the citizens they serve every day across the nation.

Amici wish to emphasize that our fundamental interest is in protecting our nation's waters and providing safe drinking water to our citizens. We and our member organizations, governments, and utilities recognize our nation's dependence on a clean and safe supply of water. *Amici* are all engaged in activities that protect, treat, reclaim, improve, or otherwise respect water quality. In arguing that the NPDES program is not the appropriate mechanism for regulating transfers and diversions of untreated water, we do not suggest that such transfers and diversions should not be subject to regulation or that their water quality impacts should not be mitigated. However, as discussed below, there are other provisions in both federal and state law that were designed to ensure that water transfers and diversions are managed responsibly. In most cases, these other provisions can regulate transfers and diversions more appropriately and effectively than the ill-suited NPDES program.

Indeed, in promulgating the CWA itself, Congress established a separate provision – independent of the NPDES program – that specifically addresses water transfers and diversions. Congress directed U.S. EPA to develop "processes, procedures, and methods to control pollution resulting from . . . changes in the movement, flow, or circulation of any navigable waters or ground waters, including changes caused by the construction of dams, levees, channels, causeways, or flow diversion facilities." CWA § 304(f)(2)(F), 33 U.S.C. § 1314(f)(2)(F). This provision makes it clear that Congress recognized that water management facilities should be treated differently from other dischargers, so as to ensure that water management for such public purposes as water supply, flood control, and navigation is not unreasonably restricted.

As described in the argument below, *amici* submit that CWA § 101(g), 33 U.S.C. § 1251(g), and decisions by several other Courts of Appeals, require that an "accommodation" be made between the CWA's NPDES program

requirements and the traditional authority of the States to allocate their water resources without unnecessary interference by federal regulation. *Amici* therefore urge this Court to grant the *Petition for Writ of Certiorari* and reverse the Second Circuit's decision.

ARGUMENT

I. CLEAN WATER ACT § 101(g) PROHIBITS THE RESULT REACHED BY THE COURT BELOW.

A. Purpose of The Wallop Amendment.

By holding that the City of New York must obtain an NPDES permit for the discharge from the Shandaken Tunnel, and that it is liable for a substantial penalty for failing to have done so in the past, the Second Circuit's decision comes into direct conflict with CWA § 101(g), 33 U.S.C. § 1251(g). That section, also known as the "Wallop Amendment," was added in 1977 to ensure that otherwise applicable requirements of the Act would not be applied in such a manner as to impermissibly interfere with state water rights. The section provides that:

> It is the policy of Congress that the authority of each State to allocate water within its jurisdiction shall not be superseded, abrogated or otherwise impaired by this Act. It is the further policy of Congress that nothing in this Act shall be construed to supersede or abrogate rights to quantities of water which have been established by any State. Federal agencies shall cooperate with State and local agencies to develop comprehensive solutions to prevent, reduce and eliminate pollution in concert with programs for managing water resources.

The sponsor of the amendment, Senator Wallop, explained during the Senate debates over the 1977 CWA that:

> The conferees adopted an amendment which will reassure the State that it is the policy of Congress that the Clean Water Act will not be used for the purpose of interfering with State water rights systems. . . . This amendment is not intended to create a new cause of action. It is not intended to change present law, for a similar prohibition is contained in section 510 of the act. This amendment does seek to clarify the policy of Congress concerning the proper role of Federal water quality legislation in relation to State water law. Legitimate water quality measures authorized by this act may at times have some effect on the method of water usage. Water quality standards and their upgrading are legitimate and necessary under this act. The requirements of section 402 and 404 permits may incidentally affect individual water rights. Management practices developed through State or local 208 planning units may also incidentally effect [sic] the use of water under an individual water right. It is not the purpose of this amendment to prohibit those incidental effects. ***It is the purpose of this amendment to insure that State allocation systems are not subverted,*** and that effects on individual rights, if any, are prompted by legitimate and necessary water quality considerations.

Senate Debate, Dec. 15, 1977 (remarks of S. Wallop), *reprinted in A Legislative History of the Clean Water Act of 1977* (committee print compiled for the Committee on Environment and Public Works by the Library of Congress), Ser. No. 95-14 (1978), at 531 (emphasis added).

As noted by Senator Wallop, CWA § 510, 33 U.S.C. § 1370, already provided that nothing in the Act shall "be construed as impairing or in any manner affecting any right or jurisdiction of the States with respect to the waters (including boundary waters) of such States." The 1977 amendment was designed to make it clear that,

although the requirements of the Act might "incidentally" affect individual water rights, state water allocation systems cannot be "subverted" by those incidental effects. The exact language of the amendment itself dictates that state water rights shall not be "superseded, abrogated or impaired" even by the legitimate purposes of the Act. Instead, state and federal agencies are directed to develop "comprehensive solutions" to control pollution "in concert with" programs for managing water resources.

Thus, although state water allocation systems are not immune or exempt from the CWA's requirements, where those requirements would have the effect of impairing the state's water rights some other solution or accommodation must be found. Several courts have recognized this principle. In *National Wildlife Federation v. Gorsuch*, 693 F.2d 156, 179 (D.C. Cir. 1982), the D.C. Circuit Court of Appeals considered the policy implications of requiring NPDES permits for dams. Although it recognized that Congress had not addressed the question directly, the court found that CWA § 101(g) provided a "specific indication in the Act that Congress did not want to interfere any more than necessary with state water management, of which dams are an important component." The court noted that, while Section 101(g) "was not intended to take precedence over 'legitimate and necessary water quality considerations,'" Congress had incorporated several other provisions in the Act that were "intended to prevent water quality goals from interfering with state water allocation plans." *Id.* at 179 n. 67. The court also found that U.S. EPA's decision not to require NPDES permits for dams, and to leave dam regulation to the states, was reasonable and not inconsistent with Congressional policy in the Act because

> . . . dam-caused pollution is unique because its severity depends partly on whether other sources have polluted the upstream river. The NPDES program, however, requires EPA to issue nationally uniform standards, and thus would not allow

> the agency to take full account of the interrelationship between dam-caused pollution and other pollution sources. Moreover, dams are a major component of state water management, providing irrigation, drinking water, flood protection, etc. In light of these complexities, which the NPDES program was not designed to handle, it may well be that state areawide water quality plans are the better regulatory tool.

Id. at 180.

Similarly, in *Riverside Irrigation District v. Andrews*, 758 F.2d 508, 510 (10th Cir. 1985), Tenth Circuit found that the Wallop Amendment indicated

> "that Congress did not want to interfere any more than necessary with state water management." National Wildlife Federation v. Gorsuch, 224 U.S. App. D.C. 41, 693 F.2d 156, 178 (D.C.Cir.1982). A fair reading of the statute as a whole makes clear that, where both the state's interest in allocating water and the federal government's interest in protecting the environment are implicated, Congress intended an accommodation.

The court recognized that if the state involved in that case could not obtain a permit, or if the permit imposed infeasible conditions or restrictions, such an eventuality might have the impermissible effect of abrogating an interstate compact and denying the state its water use rights thereunder. *Id.*

More recently, this Court explicitly addressed the potential conflict between the Wallop Amendment and the application of the NPDES permit program to state water transfer projects. While remanding the case on other grounds, this Court recognized that:

> If we read the CWA to require an NPDES permit for every engineered diversion of one navigable

> water into another, thousands of new permits might have to be issued, particularly by western States, whose water supply networks often rely on engineered transfers among various natural water bodies. . . . Many of those diversions might also require expensive treatment to meet water quality criteria. It may be that construing the NPDES program to cover such transfers would therefore raise the costs of water distribution prohibitively, and violate Congress' specific instruction that "the authority of each State to allocate quantities of water within its jurisdiction shall not be superseded, abrogated or otherwise impaired" by the Act. §1251(g).

South Florida Water Management District v. Miccosukee Tribe of Indians, 541 U.S. 95, 108 (2004).

The precise point at which the imposition of otherwise applicable permitting or pollution control requirements of the CWA would become so costly or burdensome as to violate Section 101(g) has never been directly confronted by any court. *Amici* submit, however, that the decision of the Second Circuit in this case has crossed that line. The court has ordered the City to obtain a permit that requires the imposition of controls presenting significant technical and environmental challenges. The court has also sustained the imposition of a fine that is reportedly the largest civil penalty ever imposed on a municipality under the CWA. *See* Caher, "NYC Ordered to Pay $6M Penalty for Polluting Water," *New York Law Journal* (Feb. 7, 2003). In doing so, the court below has unquestionably "superseded, abrogated or impaired" the rights of this state-sanctioned water supply program.

B. NPDES Permits Must Require Strict Compliance with Water Quality Standards Without Regard to Feasibility or Cost.

The CWA explicitly dictates that NPDES permits *cannot* be issued to point source dischargers unless the

discharge will meet "all applicable requirements" of the Act, including "any more stringent limitation" necessary to meet state water quality standards. CWA § 402(a)(1), 33 U.S.C. § 1342(a)(1). The applicable water quality standard for discharges of turbid waters in New York is "no increase that will cause a substantial visible contrast to natural conditions." N.Y. Comp. Codes R. & Regs. tit. 6, § 703.2 (2003). Because there may not be a practicable way to ensure that discharges from the Shandaken Tunnel are never more turbid than the receiving waters, requiring an NPDES permit for such discharges creates a number of environmental and public health challenges. This could lead to the curtailment of New York City's use of this water supply, jeopardizing the City's ability to ensure an adequate supply to its residents.

Even without the record established in this case, any categorical ruling that the type of water transfer system at issue must be regulated under the NPDES permit program would give rise to the same conflict. Water quality-based effluent limitations must be achieved without regard to feasibility or cost. *See Defenders of Wildlife v. Browner*, 191 F.3d 1159, 1163, as amended by 197 F.3d 1035 (9th Cir. 1999). Thus, U.S. EPA "is under a specific obligation to require that level of effluent control which is needed to implement existing water quality standards without regard to the limits of practicability." *Oklahoma v. EPA*, 908 F.2d 595, 613 (10th Cir. 1990) (internal quotation marks omitted), *rev'd on other grounds sub nom. Arkansas v. Oklahoma*, 503 U.S. 91 (1992). *See also Ackels v. U.S. EPA*, 7 F.3d 862, 865-66 (9th Cir. 1993) (holding that a permit must require compliance with state water quality standards for turbidity, even if it was not feasible to control this parameter, because "economic and technological restraints are not a valid consideration").

U.S. EPA's implementing regulations for the NPDES permit program embody this requirement in 40 C.F.R. § 122.44(d). This requirement is applicable to *all* NPDES

permits, both "individual" and "general." Consequently, this Court's suggestion in *Miccosukee* that EPA might be able to "control regulatory costs" through the use of general permits is misplaced. Although general permits can reduce administrative burdens by authorizing discharges from a specified category of dischargers, they cannot deviate from the water quality-based effluent limitations that are required for the issuance of all NPDES permits.

Due to the natural biochemical differences between distinct bodies of untreated water, transfers of water between these bodies will always result in a mixing of such constituents. If the Second Circuit's decision is left to stand, the myriad water management facilities involved in analogous diversions and transfers of natural, untreated water for water supply and flood control purposes (including other portions of New York City's water supply system) face an impossible dilemma: either to face continual enforcement actions involving civil and even criminal penalties, or to cease or curtail fundamental public water supply and water management activities.

II. THE NPDES PROGRAM WAS NOT INTENDED TO APPLY TO INTER-BASIN TRANSFERS AND DIVERSIONS OF UNTREATED WATER FOR PUBLIC PURPOSES.

Because the NPDES program lacks both the administrative capacity and the regulatory flexibility necessary to deal appropriately with transfers and diversions of untreated water, the Second Circuit's decision would compromise the continued operation of water supply and management systems across the nation. There are numerous federal and state laws that more appropriately and effectively regulate water transfers and diversions than the NPDES provisions of the CWA.

A. Congress Did Not Intend to Apply the NPDES Permit Program to Transfers and Diversions of Untreated Water.

Under the CWA, Congress directed U.S. EPA to study and make recommendations concerning "changes in the movement, flow, or circulation" of navigable waters, including those caused by "flow diversion facilities," in one of several statutory provisions addressing nonpoint sources of pollution. CWA § 304(f)(2)(F), 33 U.S.C. § 1314(f)(2)(F). In recommending consultation with appropriate Federal and State agencies on processes and methods to control pollution resulting from flow diversion facilities, including dams and levees, CWA § 304(f), 33 U.S.C. § 1314(f), Congress clearly contemplated that facilities that change the flow of water would be evaluated differently from point sources of pollutants. *See National Wildlife Federation v. Consumers Power*, 862 F.2d 580, 588 (6th Cir. 1988) (citing *National Wildlife Federation v. Gorsuch*, 693 F.2d 156, 177 (D.C. Cir. 1982)) ("This supports . . . the view that generally water quality changes caused by the existence of dams and other similar structures were intended by Congress to be regulated under 'nonpoint source' category of pollution").

B. More Appropriate Regulatory Mechanisms Exist Under Federal and State Law for Addressing Diversions of Untreated Water.

In urging rejection of the NPDES program as the tool to manage the incidental water quality impacts of water movement structures such as the Shandaken Tunnel or the S-9 pumps at issue in *Miccosukee*, the *amici* do not suggest that such structures should not be evaluated and regulated to address water quality impacts. Rather, we ask the Court to recognize that other provisions of federal and state law, such as those described below, provide more appropriate mechanisms to address any water quality impacts from inter-basin transfers of untreated water.

1. Total Maximum Daily Loads and State Water Quality Management Plans

In most cases, a receiving water that fails to meet applicable water quality standards for a particular pollutant will be placed on a state's impaired waters list under the CWA and will therefore be subject to the development of total maximum daily loads (TMDLs). CWA § 303(d), 33 U.S.C. § 1313(d). TMDLs are a management tool for identifying sources of pollutants of concern and for allocating those pollutants to their various contributors. TMDLs are implemented for point sources via NPDES permits, and for nonpoint sources through state best management practices.

The TMDL program, in contrast to the NPDES permitting program, is an appropriate planning tool to assess pollutant loadings and to select the mechanisms that will regulate and control pollutants in the water bodies at issue both in *Miccosukee* and in this case, because, in both instances, the pollutants were originally added to the water being transferred by nonpoint sources, and the TMDL program, unlike the NPDES program, considers the relative contributions of both point and nonpoint sources of pollution.

In addition to the TMDL program, states must establish Water Quality Management (WQM) Plans to address water bodies for which water quality standards cannot be attained or maintained without the control of nonpoint sources. CWA § 319(a)(1)(A), 33 U.S.C. § 1329(a)(1)(A). A WQM Plan "identifies those categories and subcategories of nonpoint sources, or, where appropriate, particular nonpoint sources which add significant pollution . . . in amounts which contribute" to the failure to meet water quality standards. CWA § 319(a)(1)(B), 33 U.S.C. § 1329(a)(1)(B). A WQM Plan includes a process for identifying best management practices to reduce pollution from the significant individual nonpoint sources or categories of sources, and describes the programs that have been

implemented to control pollution from those sources. CWA § 319(a)(1)(C) and (D), 33 U.S.C. §§ 1329(a)(1)(C) and (D). A WQM Plan includes both regulatory and non-regulatory means to control nonpoint source pollution. 40 C.F.R. §§ 130.6(c)(4)(i) and (ii). Once approved, TMDLs are incorporated into a state's WQM Plan. 40 C.F.R. § 130.7(a).

The major source of the pollutant of concern in *Miccosukee* was urban runoff, generally a nonpoint source. Similarly, in this case, turbidity and suspended solids enter the Schoharie Reservoir mainly through nonpoint sources, and result from both natural conditions in the Schoharie watershed and human activity such as farming, logging, development, and streambank and streambed disturbances. The appropriate place to address the pollutants in both cases is where they enter the water. The means to address them are the CWA's nonpoint source programs, including the TMDL program and state WQM plans.

2. Municipal Separate Storm Sewer System Permits

The NPDES program itself includes provisions that are better tailored to addressing pollutants originating in urban runoff than requiring individual NPDES permits for the transfers of water containing such pollutants. For example, stormwater discharges are regulated as "point sources" under the NPDES program because stormwater from activities most likely to cause pollution is typically controlled by storm sewers or other stormwater management systems with controlled discharge points.

Municipalities required to obtain permits for their municipal separate storm sewer systems (MS4s) are required to implement best management practices to reduce stormwater pollutants to the "maximum extent practicable" (MEP) CWA § 402(p)(3)(B)(iii), 33 U.S.C. § 1342(p)(3)(B)(iii). Thus, to the extent that the pollutants of concern in a water transfer or diversion come from

urban stormwater runoff, the MS4 permit program as well as nonpoint source best management practices can appropriately address the pollutants at their sources. The Second Circuit's decision, in contrast, would regulate such pollutants after they have entered the waters of the United States, essentially requiring water transfer facilities to "treat" these pollutants – which were introduced by other sources – in the course of diverting, pumping, or moving the water. This indirect and impractical approach focuses regulation at the wrong location, and imposes pollution control responsibilities on the wrong parties.

3. The Safe Drinking Water Act and Surface Water Treatment Rule

Municipal water supply systems are closely regulated under the federal Safe Drinking Water Act (SDWA), 42 U.S.C. § 300(f) et seq., and its implementing regulations, the so-called Surface Water Treatment Rule (SWTR), 40 C.F.R. § 141.70 et seq. The SDWA and SWTR, among other things, set the maximum level of contaminants that are allowed in public water systems, and set forth the criteria that must be met for a public water system to avoid filtration. See 40 C.F.R §§ 141.70 and 141.71. As part of the criteria to avoid filtration, the SWTR limits turbidity to 5 Nephelometric Turbidity Units (NTU) immediately prior to the first point of disinfection. 40 C.F.R. § 141.71(a)(2).

The facts of this case provide an example of how water transfers are already appropriately reviewed, managed, and regulated. Because New York City's Catskill system supplies unfiltered water to the City of New York, it operates under a Filtration Avoidance Determination (FAD) issued by the U.S. EPA under 40 C.F.R. §§ 141.71 and 141.171. The FAD contains several provisions that require the City to address and control pollution entering the City's Catskill and Delaware water supply systems from both point and nonpoint sources. It specifically requires the City to address suspended solids and turbidity

entering the source waters of the Schoharie Reservoir, and to implement any feasible, effective and cost-effective means to reduce turbidity in waters released through the Shandaken Tunnel. Thus, the pollutants at issue in this case are being addressed under the SDWA and SWTR, both 1) at the location where they enter the water system and 2) after water is released through the Shandaken Tunnel.

4. State Laws and Regulations

In addition to these federal requirements, a number of state laws and regulations address and control pollutants in the context of municipal water management and water transfers. Those which apply in New York are an example of the types of programs that exist in varying forms throughout the nation. Reservoir releases that violate state water quality standards are subject to enforcement by the Commissioner of the New York State Department of Environmental Conservation. New York State Environmental Conservation Law (ECL) § 17-0501. Releases from the Shandaken Tunnel are subject to these provisions, independent of the NPDES or New York's State Pollutant Discharge Elimination System (SPDES) program.

New York State law also prohibits changing, modifying or disturbing the course, channel or bed of any stream without a permit. ECL § 15-1501. Under another provision, a permit is required to excavate or place fill in navigable waters. ECL § 15-0505. These laws, if enforced properly, are specifically tailored to address many of the activities that create turbidity in source waters of the Schoharie reservoir, and thus in releases from the Shandaken Tunnel.

Finally, New York State directly regulates reservoir releases in order to protect receiving waters. ECL §§ 15-0801 and 15-0805. New York City is expressly required to make releases from its Shandaken Tunnel to enhance recreational use of the Esopus Creek. N.Y. Comp. Codes R.

& Regs. tit. 6, Part 670 (Reservoir Releases Regulations). The provisions of this rule offer a perfect example of the type of state water allocation system – balancing the competing interests of public water supply needs, recreational uses and environmental protection – that Congress intended to protect under the Wallop Amendment. The purpose of the rule is

> to regulate the volume and rate of change of diversions of water from the Schoharie reservoir through the Shandaken tunnel into Esopus Creek, in order to protect and enhance the recreational use of waters in Esopus Creek in a manner consistent with the protection of existing recreational uses of the Ashokan and Schoharie reservoirs, while ensuring and without impairing an adequate supply of water for power production or for any municipality which uses water from such reservoirs for drinking and other purposes.

N.Y. Comp. Codes R. & Regs. tit. 6, Part 670.1. Detailed provisions govern the operation of the Shandaken Tunnel, monitoring of releases, and consultation with the State Department of Environmental Conservation. The Department may dictate specific actions for the purpose of "protecting the fishery or other natural resources of Esopus Creek" or "protecting the fishery or other natural resources of Schoharie reservoir or Ashokan reservoir." *Id.* at § 670.3.

Under the Second Circuit's decision, this carefully-designed water allocation system would be superseded by the inflexible requirements of the federal NPDES program. Such a result is in direct conflict with the intent of Congress as set forth in CWA § 101(g), 33 U.S.C. § 1251(g), which preserves the authority of state and local agencies to develop "comprehensive solutions" to protecting the environment "in concert with programs for managing water resources."

CONCLUSION

For each of the foregoing reasons, *amici* respectfully request that the petition for certiorari be granted and that the decision of the Second Circuit be reversed.

Respectfully submitted,

DAVID W. BURCHMORE*
SQUIRE, SANDERS & DEMPSEY L.L.P.
4900 Key Tower
127 Public Square
Cleveland, OH 44114
(216) 479-8500
**Counsel of Record*

ALEXANDRA D. DUNN
General Counsel,
NATIONAL ASSOCIATION OF CLEAN WATER AGENCIES
1816 Jefferson Place, NW
Washington, DC 20036
(202) 533-1803

KENNETH A. RUBIN
MORGAN, LEWIS & BOCKIUS LLP
1111 Pennsylvania Avenue, NW
Washington, DC 20004
(202) 739-5140
Counsel for the American Water Works Association

DONNA M. GILIBERTO
General Counsel
NEW YORK CONFERENCE OF MAYORS
119 Washington Avenue
Albany, NY 12210
(518) 463-1185

CAROLYN COLEMAN, ESQ.
Director, Federal Relations
NATIONAL LEAGUE OF CITIES
1301 Pennsylvania Avenue, NW
Washington, DC 20004
(202) 626-3023

(5)

No. 06-729

FILED

JAN 26 2007

OFFICE OF THE CLERK
SUPREME COURT, U.S.

In The

Supreme Court of the United States

CITY OF NEW YORK, NEW YORK CITY DEPARTMENT OF ENVIRONMENTAL PROTECTION, and JOEL A. MIELE, SR., Commissioner of Department of Environmental Protection,

Petitioners,

v.

CATSKILL MOUNTAINS CHAPTER OF TROUT UNLIMITED, LTD., THEODORE GORDON FLYFISHERS, INC., CATSKILL-DELAWARE NATURAL WATER ALLIANCE, INC., FEDERATED SPORTSMEN'S CLUBS OF ULSTER COUNTY, INC., RIVERKEEPER, INC., STATE OF NEW YORK, NEW YORK STATE DEPARTMENT OF ENVIRONMENTAL CONSERVATION, and ERIN M. CROTTY, Commissioner of the New York State Department of Environmental Conservation,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit

BRIEF *AMICI CURIAE* OF THE STATES OF COLORADO, NEW MEXICO, ALASKA, IDAHO, NEBRASKA, NEVADA, NORTH DAKOTA, AND UTAH, IN SUPPORT OF PETITIONERS

JOHN W. SUTHERS,
Attorney General
DANIEL D. DOMENICO,
Solicitor General*
WILLIAM C. ALLISON, V, First
Assistant Attorney General
ANNETTE M. QUILL,
Assistant Attorney General
State of Colorado
1525 Sherman Street, 5th Floor
Denver, Colorado 80203
303-866-4500
303-866-3558 (fax)

GARY K. KING,
Attorney General
STEPHEN R. FARRIS,
Assistant Attorney General
JUDITH ANN MOORE,
Assistant Attorney General
State of New Mexico
P.O. Drawer 1508
Santa Fe, New Mexico 87504
505-827-6010
505-827-4440 (fax)

*Counsel of Record for all Amici

(Additional Counsel And *Amici* Listed On Inside Cover)

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

PETER D. NICHOLS,
Special Assistant
Attorney General
State of Colorado
PEGGY E. MONTAÑO,
Special Assistant
Attorney General
State of New Mexico
TROUT, RALEY, MONTAÑO,
WITWER & FREEMAN, P.C.
1120 Lincoln Street,
Suite 1600
Denver, Colorado 80203

TALIS J. COLBERG
Attorney General
State of Alaska
P.O. Box 110300
Juneau, Alaska 99811-0300

LAWRENCE WADSEN
Attorney General
State of Idaho
P.O. Box 83720
Boise, Idaho 83720-0010

CATHERINE CORTEZ MASTO
Attorney General
State of Nevada
100 North Carson Street
Carson City, Nevada
89701-4717

MARK L. SHURTLEFF
Attorney General
State of Utah
Utah State Capitol Complex
East Office Building,
Suite 320
Salt Lake City, Utah
84114-2320

JON BRUNING
Attorney General
State of Nebraska
2115 State Capitol
Lincoln, Nebraska 68509

WAYNE STENEHJEM
Attorney General
State of North Dakota
600 East Boulevard Avenue
Bismark, North Dakota
58505-0040

QUESTION PRESENTED

Western States depend upon thousands of water transfers to move billions of gallons of water every day to meet essential domestic, municipal, commercial, industrial, agricultural and other needs. The question *Amici* will address is: Whether extending the National Pollutant Discharge Elimination System to water transfers would violate the established federal-state framework of deference to State water allocation law, as also embodied in Congress' specific instruction in the Clean Water Act, 33 U.S.C. § 1251(g), not to supersede, abrogate, or impair either the authority of each State to allocate water or the States' individual water allocations.

TABLE OF CONTENTS

Page

INTEREST OF *AMICI CURIAE* 1

REASONS FOR GRANTING THE PETITION 4

ARGUMENT 4

I. THE SECOND CIRCUIT'S DECISION DOES NOT COMPORT WITH THIS COURT'S DECISIONS IN *MICCOSUKEE*, *PUD NO. 1*, AND *S.D. WARREN* 4

A. THE SECOND CIRCUIT'S DECISION HIGHLIGHTS THE CONTINUING IMPORTANCE OF ISSUES RECOGNIZED BY THIS COURT IN ITS 2004 *MICCOSUKEE* DECISION 5

B. THE SECOND CIRCUIT'S DECISION IS INCONSISTENT WITH THIS COURT'S DECISIONS IN *PUD NO. 1* AND *S.D. WARREN* 6

II. REQUIRING NPDES PERMITS FOR WATER TRANSFERS IS CONTRARY TO THE ESTABLISHED FEDERAL-STATE FRAMEWORK OF DEFERENCE TO THE STATES' ALLOCATION OF WATER AND THE POSITION OF THE AGENCY CHARGED WITH ADMINISTERING THE CLEAN WATER ACT 8

A. CONGRESS EXPRESSLY PRESERVED THE ESTABLISHED FEDERAL-STATE FRAMEWORK OF DEFERENCE TO THE STATES' ALLOCATION OF WATER IN THE CLEAN WATER ACT 8

B. THE SECOND CIRCUIT'S DECISION CONFLICTS WITH THE POSITION OF THE AGENCY CONGRESS CHARGED ADMINISTERING THE CLEAN WATER ACT 11

TABLE OF CONTENTS – Continued

Page

III. EXTENDING NPDES PERMITS TO WATER TRANSFERS WOULD SUPERSEDE, ABROGATE OR IMPAIR THE STATES' ALLOCATION OF WATER AND INTERFERE WITH INTERSTATE COMPACTS AND THIS COURT'S INTERSTATE WATER APPORTIONMENTS ... 14

A. REQUIRING NPDES PERMITS WOULD ABROGATE OR IMPAIR THE STATES' WATER ALLOCATIONS BECAUSE WATER TRANSFERS COULD NOT COMPLY WITH PERMIT CONDITIONS 14

B. THE CLEAN WATER ACT AUTHORIZES STATES TO ADOPT MORE STRINGENT REQUIREMENTS RESPECTING DISCHARGES OF POLLUTANTS ... 17

C. REQUIRING NPDES PERMITS FOR WATER TRANSFERS WOULD INTERFERE WITH INTERSTATE COMPACTS AND THIS COURT'S WATER APPORTIONMENTS..... 18

CONCLUSION..... 20

TABLE OF AUTHORITIES

Page

CASES

Arizona v. California, 373 U.S. 546 (1963) 19

California Or. Power Co. v. Beaver Portland Cement Co., 295 U.S. 142 (1935) 9

California v. United States, 438 U.S. 645 (1978) 11

Catskill Mountains Chapter of Trout Unlimited, Inc. v. City of New York, 273 F.3d 481 (2d Cir. 2001) 1

Catskill Mountains Chapter of Trout Unlimited, Inc. v. City of New York, 451 F.3d 77 (2d Cir. 2006) 1, 5, 6

Committee to Save Mokulumne River v. E. Bay Mun. Util. Dist., 13 F.3d 305 (9th Cir. 1993) 15

Environmental Def. Fund, Inc. v. E. Bay Mun. Dist., 26 Cal.3d 183, 605 P.2d 1 (1980) 17

Friends of the Everglades, Inc. v. S. Fla. Water Mgmt. Dist., No. 02-80309-Civ-Altonaga/Turnoff, slip op. at 84 (S.D. Fla. 2006) 1

Gregory v. Ashcroft, 501 U.S. 452 (1991) 9

National Wildlife Fed'n v. Gorsuch, 693 F.2d 156 (D.C. Cir. 1982) 12

Northern Great Plains Res. Council v. Fidelity Exploration and Dev. Co., 325 F.3d 1115 (9th Cir. 2003) 2

Northwest Indian Cemetery Protective Ass'n v. Peterson, 764 F.2d 581 (9th Cir. 1985) 16

PUD No. 1 v. Washington Dep't of Ecology, 511 U.S. 700 (1994) 4, 7

TABLE OF AUTHORITIES – Continued

Page

S.D. Warren v. Maine, ___ U.S.___, 126 S. Ct. 1184 (2006) 5, 7

Shokal v. Dunn, 109 Idaho 330, 707 P.2d 441 (1985) 18

Skidmore v. Swift & Co., 323 U.S. 134 (1944) 13

Solid Waste Agency of N. Cook County v. United States Army Corps of Eng'rs, 531 U.S. 159 (2001) ...8, 9, 11

South Fla. Water Mgmt. Dist. v. Miccosukee Tribe of Indians, 541 U.S. 95 (2004) 1, 5, 14

Tulkisarmute Native Cmty. Council v. Heinze, 898 P.2d 935 (Alaska 1995) 18

United States v. Lopez, 514 U.S. 549 (1995) 9

United States v. Mead Corp., 533 U.S. 218 (2001) 13

Vanscoter v. Sullivan, 920 F.2d 1441 (9th Cir. 1990) 12

Western Nuclear v. Huffman, 825 F.2d 1430 (10th Cir. 1987) 12

Young v. Community Nutrition Inst., 476 U.S. 974 (1986) 12

STATUTES

33 U.S.C. § 1251(b) (2006) 9

33 U.S.C. § 1251(g) 9, 10

33 U.S.C. § 1311(b)(1)(C) 16

33 U.S.C. § 1313(e)(3)(A) 16

33 U.S.C. § 1314(e) 15

33 U.S.C. § 1342 13

33 U.S.C. § 1370 ..... 9, 17

TABLE OF AUTHORITIES – Continued

Page

Colorado River Compact, 42 Stat. 171 (1921) 19

Rio Grande Compact, 53 Stat. 785 (1939) 19

CAL. WATER CODE §§ 1257, 1258 (2006) 17

CAL. WATER CODE § 13000 *et seq.* 17

COLO. REV. STAT. § 25-8-202(7)(b)(II)(A) (2006) 18

COLO. REV. STAT. § 25-8-205(1)(c) 17

COLO. REV. STAT. § 25-8-501(1) 18

COLO. REV. STAT. § 25-8-503(5) 17

REGULATIONS

40 C.F.R. § 122.44(d)(1)(i) (2006) 15

40 C.F.R. § 130.2(m) 16

40 C.F.R. § 131.12(a)(2) 15

RULES

Supreme Court Rule 37.4 1

OTHER AUTHORITIES

Agency Interpretation on the Applicability of Section 402 of the Clean Water Act to Water Transfers, Docket No. EPA-HQ-OW-2006-0141 (Aug. 5, 2005) 12

H.R. CONF. REP. No. 95-830 (1977) 10

TABLE OF AUTHORITIES – Continued

Page

NPDES Water Transfers Proposed Rule, 71 Fed. Reg. 32887 (Proposed June 7, 2006) 12

United States Department of Interior, Bureau of Reclamation, *Water Supply Crises by 2025*, http://www.doi.gov/water2025 (May 2003) 3

INTEREST OF *AMICI CURIAE*

Amici Curiae, the Attorneys General of the States of Colorado, New Mexico, Alaska, Idaho, Nebraska, Nevada, North Dakota, and Utah submit this brief pursuant to Supreme Court Rule 37.4 in support of New York City's ("NYC") Petition for a Writ of Certiorari seeking reversal of the lower court's decision in *Catskill Mountains Chapter of Trout Unlimited, Inc. v. City of New York*, 451 F.3d 77 (2d Cir. 2006) ("*Catskill II*").

In *South Fla. Water Mgmt. Dist. v. Miccosukee Tribe of Indians*, this Court concluded that a permit under § 402 of the Clean Water Act ("CWA" or "Act") is *not* required for a water transfer where the source and receiving water bodies are not "meaningfully distinct." 541 U.S. 95, 112 (2004). The Second Circuit adopted the inverse of this holding in *Catskill II*, affirming its holding in *Catskill Mountains Chapter of Trout Unlimited, Inc. v. City of New York*, 273 F.3d 481 (2d Cir. 2001), that a transfer of water containing pollutants from one distinct water body into another is an "addition of [a] pollutant" under the Act, and accordingly a permit for NYC's transfer was required. 451 F.3d at 80; 84-85. This Court should clarify its *Miccosukee* decision regarding ...n and if such permits are required to remove the treme idous uncertainty created by the holding of the Second Circuit,[1] which would severely reduce the essential water supplies of

[1] Additional uncertainty arises from the recent holding of the Southern Florida District Court that "water transfers between distinct water bodies that result in the addition of a pollutant to the receiving navigable water body are subject to the NPDES permitting program." *Friends of the Everglades, Inc. v. S. Fla. Water Mgmt. Dist.*, No. 02-80309-Civ-Altonaga/Turnoff, slip op. at 84 (S.D. Fla. 2006).

the nation's citizens, businesses, and industries who rely on thousands of water transfers every day.[2]

The western part of the United States is generally arid; that is, it receives less than the thirty inches of annual precipitation necessary to sustain non-irrigated agriculture. Since most precipitation in the West falls as snow, water must be captured when and where the snow melts in remote areas far from the major urban and agricultural centers that need the water. Hence, it is necessary to transfer water through complex systems of manmade and natural conveyances and reservoirs to places of need and use. These water transfers allow the West to sustain its cities, farms, and ranches. Without this elaborate system of water transfers, many nationally-important agricultural regions could not grow crops, including the Central and Imperial Valleys of California, Weld and Larimer Counties in Colorado, and the Snake River Valley of Idaho. Similarly, many of the West's great cities could not exist, including Albuquerque, Cheyenne, Denver, Las Vegas, Los Angeles, Phoenix, Reno, Salt Lake City, and San Francisco.

Under individual water rights determined pursuant to State water law, countless public and private entities in the western United States divert water from natural streams and lakes. Many then transfer water through manmade tunnels, canals, and pipelines into other natural streams and lakes to meet the water needs of residents in other watersheds. Water transfers may be as simple as the

---

[2] *Amici* distinguish the discharge of produced waters from coal bed methane ("CBM") from water transfers that are at issue in this case. *See, e.g., Northern Great Plains Res. Council v. Fidelity Exploration and Dev. Co.*, 325 F.3d 1115, 1163 (9th Cir. 2003) ("CBM water is a pollutant pursuant to the CWA").

diversion of water from a river into an adjacent (but hydrologically separate) stream for delivery to a nearby field, or as massive as the transfer of Sacramento River water by the federal Central Valley Project and State Water Project to serve citizens throughout northern, central, and southern California. In the Upper Colorado River Basin alone there are at least 36 major water transfers that move approximately 229 billion gallons of water per year from the basin of origin for use in another basin, often in another State. Extending the National Pollutant Discharge Elimination System ("NPDES") program to such water transfers supersedes, abrogates, or impairs each of these water transfers, which would prevent *Amici* from meeting the essential water demands of more than 60 million residents of the arid West.

The Department of the Interior predicts western water supply crises by 2025 because of competing demands from explosive population growth in arid areas, emerging needs for environmental and recreational uses, and the growing importance of food and fiber production from western farms and ranches. *See* United States Department of Interior, Bureau of Reclamation, *Water Supply Crises by 2025*, http://www.doi.gov/water2025 (May 2003). Unfortunately, existing water supplies that rely on water transfers are currently inadequate even in years with normal precipitation. *Id.* Extension of the NPDES Program to water transfers would exacerbate the looming crises by reducing the volume of essential water that could be transferred to places of need.

In sum, the ability to divert, transport, store, and use water is critical to the social and economic well-being of the West. Moving water from one basin to another is essential to meet domestic, municipal, commercial, industrial, and

agricultural demands. Extension of the NPDES Program to water transfers gravely threatens the continued vitality of this system.

REASONS FOR GRANTING THE PETITION

There are three reasons this Court should grant the Petition. First, the Petition presents a clear question of law that this Court recognized in *Miccosukee* is one of national importance, and particularly to the West. Second, because the Second Circuit's decision conflicts with the established federal-state framework and Congress' express deference to State water allocations in the Clean Water Act and with the official position of the agency charged with administering the Act, the decision below creates costly confusion and uncertainty for State water allocation planning and water quality regulation. Third, extension of the NPDES Program to water transfers would supersede, abrogate, or impair State water law and State water allocations and interfere with interstate compacts and this Court's interstate water apportionments.

ARGUMENT

I. THE SECOND CIRCUIT'S DECISION DOES NOT COMPORT WITH THIS COURT'S DECISIONS IN *MICCOSUKEE, PUD NO. 1,* AND *S.D. WARREN.*

The Second Circuit's decision requiring NPDES permits for water transfers is at odds with this Court's acknowledgement in *Miccosukee* that imposition of the NPDES permitting program on water transfers would violate Congress' specific instruction in the Clean Water Act to defer to the authority of the States to allocate water. Moreover, the Second Circuit's decision rests on a misreading of this Court's decision in *PUD No. 1 v. Washington*

Dep't of Ecology, 511 U.S. 700 (1994), a decision reinforced last term by *S.D. Warren v. Maine*, ___ U.S.___, 126 S. Ct. 1184 (2006). In those cases, this Court affirmed the authority of States to impose *State* – not federal – water pollution controls on State water allocations. This Court should grant the Petition to correct the Second Circuit's misinterpretation that is causing great national uncertainty about essential water transfers.

A. The Second Circuit's Decision Highlights the Continuing Importance of Issues Recognized By This Court In Its 2004 *Miccosukee* Decision.

The Second Circuit held that all water transfers are subject to the NPDES permitting requirement under the CWA. *Catskill II*, 451 F.3d at 84-85. In *Miccosukee,* this Court acknowledged the potentially far-reaching effects of requiring NPDES permits for water transfers and the unique importance of this issue to western States:

> If we read the Clean Water Act to require an NPDES permit for every engineered diversion of one navigable water into another, thousands of new permits might have to be issued, particularly by western States, whose water supply networks often rely on engineered transfers among various natural water bodies. *See* Brief for Colorado et al. as *Amici Curiae* 2-4. Many of those diversions might also require expensive treatment to meet water quality criteria. It may be that construing the NPDES Program to cover such transfers would therefore raise the costs of water distribution prohibitively, and violate Congress' specific instruction that "the authority of each State to allocate quantities of water within

> its jurisdiction shall not be superseded, abrogated or otherwise impaired" by the Act.

541 U.S. at 108. The Second Circuit's decision requiring NPDES permits for water transfers is inconsistent with these valid concerns, thus highlighting the continuing importance of this issue for the nation.

As it now stands, water suppliers, including western States, major western municipalities, water supply districts, and irrigators who depend on water transfers, suffer from a lack of certainty both regarding the continued availability of their existing water supplies and the cost of delivering whatever water supplies would remain available to them if NPDES permits are required. State water quality agencies would also benefit from clarity as to whether they should require permits under their respective programs. If the established federal-state framework is maintained as Congress intended, these entities will be able to continue supplying water at a reasonable cost. If, however, the Second Circuit's interpretation prevails, the water supply system in the West will have to be revamped, at a much higher cost.

B. The Second Circuit's Decision Is Inconsistent With This Court's Decisions In *PUD No. 1* And *S.D. Warren*.

To reach its decision, the Second Circuit concluded "[t]he power of the states to allocate quantities of water within their borders is *not inconsistent with federal regulation* of water quality" through the NPDES permitting scheme. *Catskill II*, 451 F.3d at 84 (emphasis added). That conclusion rests on a misreading of this Court's prior decisions. *PUD No. 1* and *S.D. Warren* affirm the authority

of the States – not the federal government – to impose *State* water pollution controls on State water allocations.

In *PUD No. 1*, the State of Washington issued a § 401 water quality certification imposing a variety of conditions on a hydroelectric project, including a minimum stream flow requirement. 511 U.S. at 709. As this Court explained, "State water quality standards adopted pursuant to § 303 are among the 'other limitations' with which a State may ensure compliance through the § 401 certification process." *Id.* at 713. Similarly, in *S.D. Warren*, the State of Maine "issued certifications that required Warren to maintain a minimum stream flow in the bypassed portions of the river and to allow passage for migratory fish and eels." 126 S.Ct. at 1847. As in *PUD No. 1*, this Court recognized that "State certifications under § 401 are essential in the scheme to preserve State authority to address the broad range of pollution." *Id.* at 1853.

This Court also recognized that State imposition of water pollution controls under § 401 on State water allocations is entirely consistent with Congress' mandate in § 101(g) of the Act, which expressly preserves "the authority of each State to allocate quantities of water within its jurisdiction." *PUD No. 1*, 511 U.S. at 720. For the federal government to exercise such water pollution control authority over State water allocations pursuant to § 402, in contrast, is not supported by this Court's decisions in *PUD No. 1* and *S.D. Warren* and is inconsistent with Congress' mandate in § 101(g) of the Act, as explained below.

In sum, the Second Circuit's decision does not comport with this Court's reading of the Clean Water Act in *Miccosukee, PUD No. 1* and *S.D. Warren*.

II. Requiring NPDES Permits For Water Transfers Is Contrary To The Established Federal-State Framework Of Deference To The States' Allocation Of Water And The Position Of The Agency Charged With Administering The Clean Water Act.

As explained below, Congress expressed its clear intent to defer to State water allocation law and specific State water allocations in the plain language of the Act, as confirmed by its legislative history. The Second Circuit, however, adopted a statutory interpretation of the Act that would fundamentally alter the established federal-state framework of deference to State water allocations. Requiring an NPDES permit for water transfers is contrary to Congress' directives not to interfere with the federal-state framework and the position of the agency Congress charged with administering the Act.

A. Congress Expressly Preserved The Established Federal-State Framework Of Deference To The States' Allocation Of Water In The Clean Water Act.

Land and water uses are traditionally and primarily State prerogatives. *Solid Waste Agency of N. Cook County v. United States Army Corps of Eng'rs*, 531 U.S. 159, 174 (2001).

> Unless Congress has expressed a clear intent for federal regulation in an area of traditional State authority, this Court has warned against statutory interpretations that alter the federal-state framework by permitting federal encroachment upon a traditional state power. "Unless Congress conveys its purpose clearly, it will not be deemed to have significantly changed the federal-state balance."

> Thus, "where an otherwise acceptable construction of a statute would raise serious constitutional problems, the Court will construe the statute to avoid such problems unless such construction is plainly contrary to the intent of Congress.

Id. at 173 (citations omitted); *see also Gregory v. Ashcroft*, 501 U.S. 452, 460-61 (1991); *United States v. Lopez*, 514 U.S. 549, 581 (1995) (Kennedy, J., concurring); *California Or. Power Co. v. Beaver Portland Cement Co.*, 295 U.S. 142, 163-64 (1935). Congress expressed its clear intent in the Act to preserve, rather than alter, the established federal-state framework through purposeful and continued deference to State water law. 33 U.S.C. §§ 1251(b), 1251(g), 1370 (2006).

In 1972, Congress incorporated its long-standing deference to State water law in § 510 of the Act, stating "[e]xcept as expressly provided in this chapter, nothing in this chapter shall . . . be construed as impairing or in any manner affecting any right or jurisdiction of the States with respect to the waters (including boundary waters) of such States." 33 U.S.C. § 1370. At that time, Congress also expressed a general policy "to recognize, preserve, and protect the primary responsibilities and rights of States to prevent, reduce, and eliminate pollution, to plan the development and use (including restoration, preservation, and enhancement) of land and water resources . . . " 33 U.S.C. § 1251(b). In adopting the Act, Congress clearly intended that primary authority over water administration matters would continue to rest with the States.

In the 1977 amendments to the Act, Congress took the opportunity to reiterate and clarify its intent with respect to State authority over water quantity issues:

> It is the policy of Congress that the authority of each State to allocate quantities of water within its jurisdiction shall not be superseded, abrogated or otherwise impaired by this chapter. It is

> the further policy of Congress that nothing in this chapter shall be construed to supersede or abrogate rights to quantities of water which have been established by any State. Federal agencies shall co-operate with State and local agencies to develop comprehensive solutions to prevent, reduce and eliminate pollution in concert with programs for managing water resources.

33 U.S.C. § 1251(g).[3] Here, Congress mandated not only deference to the States, but also respect for individual water rights determined pursuant to the States' water laws. To the extent water quality concerns arise in the context of water allocations, the Act requires the federal government to cooperate with the States to develop comprehensive solutions. *Id.*

Notably, the 1977 amendment strengthened language adopted just five years earlier in §§ 101(b) and 510 that recognized federal deference to the States in the matter of State control over water quantity issues. Thus, over time

---

[3] In adopting § 101(g), Congress reacted swiftly and decisively to the suggestion that diminishing water transfers under State water law might be necessary to solve water quality problems. The Conference Committee stated:

> [I]t is the policy of Congress that the authority of each State to allocate quantities of water within its jurisdiction should not be superseded, abrogated or otherwise impaired by this Act. . . . [and] that nothing in this Act should be construed to supersede or abrogate rights to quantities of water that have been established by any State.

H.R. CONF. REP. No. 95-830, at 52 (1977), *reprinted in* 3 LEGISLATIVE HISTORY OF THE CLEAN WATER ACT OF 1977, at 236 (1978) (committee print compiled for the Committee on Environment and Public Works by the Library of Congress); *see also* S. DEB.: August 4, 1977, *Id.* at 1030 (Remarks of Sen. Wallop during Senate debate on the amendment); S. DEB.: Dec. 15, 1977, *Id.* at 531 (Remarks of Sen. Wallop explaining conference report).

Congress added language to the Act that reinforced and strengthened federal deference to State water law and water allocations.

The Supreme Court and Congress have spoken with clear and consistent voices regarding the allocation of water. For example, subsequent to Congress' adoption of the Act in 1972 and § 101(g) in 1977, this Court observed in its landmark decision in *California v. United States,* 438 U.S. 645, 653 (1978):

> The history of the relationship between the Federal Government and the States in the reclamation of the arid lands of Western States is both long and involved, but through it runs the consistent thread of purposeful and continued deference to state water law by Congress.

The Second Circuit adopted a construction of the Act that would fundamentally alter the established federal-state framework of deference to State water law. Contrary to Congress' specific instruction, extending the NPDES program to water transfers would supersede, abrogate, or impair State water allocations, which would prevent *Amici* from meeting the essential water needs of their residents. Imposing NPDES permitting requirements on water transfers would be "plainly contrary to the intent of Congress." *Solid Waste Agency*, 531 U.S. at 174.

B. The Second Circuit's Decision Conflicts With The Position Of The Agency Congress Charged Administering The Clean Water Act.

The Second Circuit's decision directly conflicts with the official position of the Environmental Protection Agency ("EPA"), which is that "Congress did not generally intend to subject water transfers to the NPDES Program.

Rather, Congress intended to leave the oversight of water transfers to water resource management agencies and the States." NPDES Water Transfers Proposed Rule, 71 Fed. Reg. 32887, at 32891 (Proposed June 7, 2006) ("EPA's Proposed Rule"); Agency Interpretation on the Applicability of Section 402 of the Clean Water Act to Water Transfers, Docket No. EPA-HQ-OW-2006-0141, at 8 (Aug. 5, 2005) ("EPA's Interpretation").

EPA's Proposed Rule and Interpretation codify the agency's long-standing reading of the Act. *See National Wildlife Fed'n v. Gorsuch*, 693 F.2d 156, 167 (D.C. Cir. 1982) ("EPA's construction was made contemporaneously with the passage of the Act, and has been consistently adhered to since."). That EPA did not find it necessary to promulgate a formal rule on water transfers earlier should not undermine the level of deference to which EPA is entitled. The question simply was not a national issue before the *Miccosukee* decision, because there was nearly universal understanding that water transfers were not subject to the NPDES Program.

EPA's Proposed Rule is entitled to considerable deference. *See, e.g., Vanscoter v. Sullivan*, 920 F.2d 1441, 1449 (9th Cir. 1990) ("Although the . . . transmittal and subsequent Notice of Proposed Rulemaking may not themselves have the force of law, they constitute the Secretary's authoritative administrative interpretation of the governing statute . . . [w]e find the Secretary's interpretation of the statute reasonable and defer to it.").

EPA's Interpretation is also entitled to deference on its own merits. *See, e.g., Young v. Community Nutrition Inst.*, 476 U.S. 974, 981 (1986) ("We find the FDA's interpretation of § 346 to be sufficiently rational to preclude a court from substituting its judgment for that of the FDA."); *Western Nuclear v. Huffman*, 825 F.2d 1430, 1438 (10th

Cir. 1987), *rev'd on other grounds and remanded*, 486 U.S. 663 (1988) (The critical point in the analysis was that the "FDA [had] advanced an interpretation of an ambiguous statutory provision. Once that point was reached, the Court was required to defer to the reasonable interpretation of the agency." [citation omitted]).

EPA's Proposed Rule and Interpretation are entitled to at least the degree of deference afforded under *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944). "[A]n agency's interpretation may merit some deference whatever its form, given the 'specialized experience and broader investigations and information' available to the agency, and given the value of uniformity in its administrative and judicial understandings of what a national law requires." *United States v. Mead Corp.*, 533 U.S. 218, 234 (2001) (quoting *Skidmore*, 323 U.S. at 139). The measure of deference the Court should give to an administrative interpretation in a given case depends upon "the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control," *Skidmore*, 323 U.S. at 140, as well as its formality and relative expertness. *Mead*, 533 U.S. at 228.

The conflict between the Second Circuit's decision and EPA's position is of more than theoretical interest because EPA has not delegated administration of the NPDES Program to all States under the Act.[4] 33 U.S.C. § 1342. For example, the Connecticut River forms the boundary between Vermont and New Hampshire. The Second Circuit's decision would require an NPDES permit for a water transfer from the Connecticut River into Vermont, a

[4] For example, Colorado is a delegated State; New Mexico is not.

delegated State within the Second Circuit, while EPA would not require a permit for a water transfer *from the same river* into adjacent New Hampshire, a non-delegated State outside the Second Circuit where EPA administers the NPDES Program.

III. EXTENDING NPDES PERMITS TO WATER TRANSFERS WOULD SUPERSEDE, ABROGATE OR IMPAIR THE STATES' ALLOCATION OF WATER AND INTERFERE WITH INTERSTATE COMPACTS AND THIS COURT'S INTERSTATE WATER APPORTIONMENTS.

Expanding the NPDES Program to include water transfers would eviscerate the fundamental doctrine of State water allocation law because it would either limit or, in some cases, end the transfer of water. Permit conditions that prevent or render prohibitively costly the transfer of some or all of the water legally available to individual water rights allocated under State law would directly supersede or abrogate State water allocations, injuring *Amici* and western water users. Further, requiring permits for water transfers would jeopardize interstate compacts and this Court's interstate water apportionments.

A. REQUIRING NPDES PERMITS WOULD ABROGATE OR IMPAIR THE STATES' WATER ALLOCATIONS BECAUSE WATER TRANSFERS COULD NOT COMPLY WITH PERMIT CONDITIONS.

The Second Circuit's holding that the CWA requires permits for water transfers would have drastic effects on the historic practice of transporting water where it is most needed. In *Miccosukee*, this Court postulated that general permits might ameliorate the impact of extending the

NPDES Program to water transfers. 541 U.S. at 108-09. General permits might alleviate the administrative burden upon permit-issuing agencies. However, general permits would not address the impact on State water allocations. All NPDES permits – general as well as individual permits – must include limitations to comply with water quality standards.[5] All permits are also subject to antidegradation requirements[6] and may include requirements for the use of best management practices[7] for

---

[5] If a discharge merely has the "potential to cause . . . an excursion above any State water quality standard," its NPDES permit must contain conditions to control all contributing pollutants. 40 C.F.R. § 122.44(d)(1)(i) (2006); *see also Committee to Save Mokulumne River v. E. Bay Mun. Util. Dist.*, 13 F.3d 305, 309 (9th Cir. 1993). ("The [Clean Water] Act does not impose liability only where a point source discharge creates a net increase in the level of pollution. Rather, the Act categorically prohibits any discharge of a pollutant from a point source without a permit."). Thus, an NPDES permit necessarily contains conditions that limit the amount of pollutants delivered to the receiving waters regardless of whether standards are, in fact, exceeded or whether the transfer has the potential to cause an exceedance. Water quality almost inevitably varies between basins. Movement of water from one basin to another would therefore be subject to a permit limit(s) even though the transferor has no ability to control naturally-occurring or ubiquitous pollutants.

[6] Where the quality of waters "exceed[s] levels necessary to support propagation of fish, shellfish, and wildlife and recreation in and on the water," the antidegradation provisions of the Act apply to maintain and protect existing quality. 40 C.F.R. § 131.12(a)(2). Although transferred water is often suitable for beneficial use without treatment, water transfers would nonetheless be subject to this "no degradation" requirement if an NPDES permit were necessary. Antidegradation requirements can apply where only one water quality constituent is better than the corresponding stream standard. The only practical way for many diverters to meet antidegradation requirements for high quality waters may be to curtail transfers and forgo the use of a portion of their State-allocated water right.

[7] NPDES permits may require best management practices ("BMPs"). 33 U.S.C. § 1314(e). BMPs are methods and practices, including structural

(Continued on following page)

dischargers. 33 U.S.C. §§ 1311(b)(1)(C), 1313(e)(3)(A). Thus, the general permit process would not change NPDES Program requirements that would force many transferors to forgo the full exercise of their State water rights.

If required to operate under NPDES permits – general or individual – many water rights owners would have no alternative but to curtail their transfers to meet water quality standards and antidegradation requirements of the Act, as it would be impractical and cost prohibitive to construct treatment facilities. These substantive provisions would apply regardless of how simplified the administrative process might be.[8]

---

and nonstructural controls and operation and maintenance procedures, applied before, during, or after pollution-producing activities to reduce or eliminate the introduction of pollutants into receiving waters. *See, e.g.*, 40 C.F.R. § 130.2(m). Adherence to BMPs – generally simpler and less costly than the usual technological controls – does not automatically assure compliance with requirements of the Act concerning water quality standards, *Northwest Indian Cemetery Protective Ass'n v. Peterson*, 764 F.2d 581 (9th Cir. 1985), *rev'd on other grounds and remanded by Lyng v. Northwest Indian Cemetery Protective Ass'n*, 485 U.S. 439 (1988), or antidegradation. Furthermore, it is difficult to envision how many water providers would utilize BMPs in an economical manner to control source water quality without significantly curtailing the full use of their State-allocated water rights.

[8] Even for States such as Alaska, which is currently seeking EPA's approval to administer the NPDES Program and where arid conditions generally are not an issue, the economic cost of authorizing water transfers under the NPDES permit system would pose a tremendous, impractical and unrealistic burden for the administering agency and an applicant, while at the same time usurping existing and adequate State authorities already governing water transfers.

B. The Clean Water Act Authorizes States To Adopt More Stringent Requirements Respecting Discharges Of Pollutants.

Many States have enacted water quality laws to supplement the Act, authority explicitly recognized by the Congress. 33 U.S.C. § 1370. For example, the State Water Project and Central Valley Project in California are the largest water transfers in the country. These transfers are regulated under State water allocation laws that may impose requirements to protect water quality, e.g., CAL. WATER CODE §§ 1257, 1258 (2006), and under State water quality law, CAL. WATER CODE § 13000 *et seq. See also Environmental Def. Fund, Inc. v. East Bay Mun. Dist.*, 26 Cal.3d 183, 198, 605 P.2d 1, 9 (Cal. 1980) (The State Water Resources Control Board "has been granted broad authority to control and condition water use, insuring utilization consistent with the public interest. . . . The [board's] powers extend to regulation of water quality.").

Colorado has similar State statutory authority to regulate any "activity" that causes "the quality of any State waters to be in violation of any applicable water quality standard." COLO. REV. STAT. § 25-8-205(1)(c) (2006). The Colorado statute also contains specific regulatory authority empowering the State to protect water quality through the adoption of control regulations[9] for discharges from the "diversion, carriage, and exchange of water from or into streams, lakes, reservoirs, or conveyance structures, or storage of water in or the release of water from lakes, reservoirs, or conveyance structures." COLO. REV. STAT. § 25-8-503(5). The

[9] Control regulations may, for example, "describe precautionary measures, both mandatory and prohibitory, that must be taken by any person . . . [who] could reasonably be expected to cause pollution of any state waters . . . or . . . be in violation of any applicable water quality standard." COLO. REV. STAT. § 25-8-205(1)(c).

State may also adopt control regulations when necessary to assure compliance with water quality standards and classifications. COLO. REV. STAT. § 25-8-202(7)(b)(II)(A).[10]

A number of States can also apply a "public interest test" to protect water quality when granting a water right. For example, in Idaho, "if an applicant's appropriation of water will conflict with the local public interest . . . then the Director may reject such application and refuse a permit therefore . . . or may grant a permit upon conditions." *Shokal v. Dunn*, 109 Idaho 330, 336, 707 P.2d 441, 448 (1985) (internal quotations omitted). Similarly, Alaska "may not issue a permit unless doing so is in the public interest," considering the "impacts of water appropriation on fish and game resources, and public health." *Tulkisarmute Native Cmty. Council v. Heinze*, 898 P.2d 935, 950 (Alaska 1995).

In each of these examples, the States have authority under State law to protect water quality as well as the vital transfer of water for beneficial use. If a State determines that discharge permits for water transfers are needed, then that State is free to adopt such a program. However, the Clean Water Act does not require States to do so.

C. REQUIRING NPDES PERMITS FOR WATER TRANSFERS WOULD INTERFERE WITH INTERSTATE COMPACTS AND THIS COURT'S WATER APPORTIONMENTS.

A significant number of water transfers occur on interstate stream systems, the waters of which are allocated

---

[10] While conveyances are not subject to NPDES permitting, the Colorado statute prohibits the discharge of any pollutant into a ditch or man-made conveyance for the purposes of evading NPDES permitting requirements. COLO. REV. STAT. § 25-8-501(1). Thus, a discharger could not evade permitting by discharging pollutants to a water transfer rather than a stream.

among the States by interstate compact or Supreme Court decree.[11] Extending the NPDES Program to water transfers – the holding of the Second Circuit – would interfere with such interstate allocations without a clear statement that Congress intended to do so.

States may not be able to utilize fully their legal entitlement to use scarce water if – due to technically or economically impossible NPDES Program requirements – they cannot transfer legally available water from one basin to another to meet demands. For example, Colorado uses a portion of its Colorado River Compact entitlement to meet needs in the South Platte River and Arkansas River Basins. These basins lack adequate native water to meet Colorado's needs and its Compact delivery requirements to downstream States. Similarly, New Mexico uses much of its Colorado River Compact entitlement in the Rio Grande Basin; Arizona uses most of its entitlement in the Gila and Salt River Basins; and California transfers much of its entitlement outside the basin to serve coastal communities. Trans-basin water transfers also often mitigate the impact of native water diversions in the receiving basin, allowing a State to meet its water delivery obligations to downstream States in the receiving river basin. For example, New Mexico uses Colorado River Basin water to meet needs in the Rio Grande Basin, which is often water short, thus helping to ensure that the State can meet its delivery obligations under the Rio Grande Compact. *See* Rio Grande Compact, 53 Stat. 785 (1939).

---

[11] *See, e.g.*, Colorado River Compact, 42 Stat. 171 (1921) (among Ariz., Cal., Colo., Nev., N.M., Utah, and Wyo.); *Arizona v. California*, 373 U.S. 546 (1963) (allocating the lower Colorado River among Ariz., Cal., and Nev.).

CONCLUSION

For the foregoing reasons, *Amici Curiae* respectfully urge the Court to grant New York City's Petition for Certiorari.

Respectfully submitted,

JOHN W. SUTHERS,
Attorney General
DANIEL D. DOMENICO,
Solicitor General*
WILLIAM C. ALLISON, V, First
Assistant Attorney General
ANNETTE M. QUILL,
Assistant Attorney General
State of Colorado
1525 Sherman Street, 5th Floor
Denver, Colorado 80203
303-866-4500
303-866-3558 (fax)

GARY K. KING,
Attorney General
STEPHEN R. FARRIS,
Assistant Attorney
General
JUDITH ANN MOORE,
Assistant Attorney
General
State of New Mexico
P.O. Drawer 1508
Santa Fe, New Mexico
87504
505-827-6010
505-827-4440 (fax)

**Counsel of Record for all Amici*

Supreme Court, U.S.
FILED
JAN 26 2007
OFFICE OF THE CLERK

No. 06-729

In The
Supreme Court of the United States

CITY OF NEW YORK, NEW YORK CITY DEPARTMENT OF ENVIRONMENTAL PROTECTION, and JOEL A. MIELE, SR., Commissioner of Department of Environmental Protection,

Petitioners,

v.

CATSKILL MOUNTAINS CHAPTER OF TROUT UNLIMITED, LTD., THEODORE GORDON FLYFISHERS, INC., CATSKILL-DELAWARE NATURAL WATER ALLIANCE, INC., FEDERATED SPORTSMEN'S CLUBS OF ULSTER COUNTY, INC., RIVERKEEPER, INC., STATE OF NEW YORK, NEW YORK STATE DEPARTMENT OF ENVIRONMENTAL CONSERVATION, and ERIN M. CROTTY, Commissioner of the New York State Department of Environmental Conservation,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit

BRIEF OF *AMICI CURIAE*, NATIONAL ASSOCIATION OF FLOOD AND STORMWATER MANAGEMENT AGENCIES, SOUTH FLORIDA WATER MANAGEMENT DISTRICT AND FLORIDA ASSOCIATION OF SPECIAL DISTRICTS IN SUPPORT OF PETITIONERS

JAMES E. NUTT, ESQ.
Counsel of Record for all Amici
SOUTH FLORIDA WATER MANAGEMENT DISTRICT
3301 Gun Club Road
West Palm Beach, FL 33406
(561) 682-6253

TERRY E. LEWIS, ESQ.
FLA. ASSOC. OF SPECIAL DISTRICTS
LEWIS, LONGMAN & WALKER, P.A.
1700 Palm Beach Lakes Blvd.,
Ste. 1000
West Palm Beach, FL 33401
(561) 840-8020

KIRK HOWARD BETTS, ESQ.
NATIONAL ASSOC. OF FLOOD AND STORMWATER MANAGEMENT AGENCIES
BETTS & HOLT LLP
West Tower – 10th Floor
1333 H Street, NW
Washington, D.C. 20005
(202) 530-3380

QUESTION PRESENTED

The courts of appeals are divided over the statutory phrase "discharge of pollutants" and interpretive principles left unresolved in *South Florida Water Management District v. Miccosukee*, 541 U.S. 95 (2004). The Clean Water Act (CWA) carefully defines the "discharge of pollutants" to mean "any addition of any pollutant to navigable waters from any point source." What constitutes an "addition . . . to navigable waters" determines the scope of federal permitting jurisdiction and, thus, delineates federal and state roles under the Act's cooperative federalism scheme. The Second Circuit interpreted the Act contrary to the longstanding and consistent position of the United States Environmental Protection Agency – an interpretation other courts of appeals have accepted – flatly declining any deference to EPA's presently proposed rule. *Amici curiae* – various state and local agencies and others deeply involved in local water resource management nationwide – are concerned with this judicially lead, seismic shift in federal authority. It has become of critical national importance for this Court to clarify the proper CWA interpretation through the following question presented by the petition:

> Whether under the Clean Water Act it is illegal for State, regional and local agencies to transfer navigable waters without a National Pollutant Discharge Elimination System permit.

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

TABLE OF AUTHORITIES iii

INTEREST OF THE *AMICI CURIAE* 1

SUMMARY OF THE ARGUMENT 4

ARGUMENT 6

1. THE CLEAN WATER ACT DOES NOT UNAMBIGUOUSLY EXTEND FEDERAL NPDES JURISDICTION TO PUBLIC WATER TRANSFER FACILITIES 7

   a. The Adjectival Effect Of The Preposition "To" And Its Subjective Limits The Verb "Addition" 8

   b. The Adjectival Effect Of Congress Having Chosen The Prepositional Phrase "To Navigable Waters" Excludes Water Transfers From NPDES 9

2. WELL-ESTABLISHED AND FUNDAMENTAL RULES OF STATUTORY INTERPRETATION CONFIRM EPA'S STATUTORY INTERPRETATION 12

   a. The Clear Statement Rule Prohibits The Extension Of NPDES To State And Local Water Management 13

   b. Deference Should Have Been Given To The Longstanding Practice, Legal Interpretation And Proposed Rule Of The Implementing Agencies 15

   c. The Clean Water Act's Severe Criminal Penalties Require It To Be Narrowly Construed 18

TABLE OF CONTENTS – Continued

Page

3. THE COURT SHOULD RESOLVE THIS MATTER THROUGH THIS CASE 19

CONCLUSION 20

TABLE OF AUTHORITIES

Page

CASES:

Atascadero State Hospital v. Scanlon, 473 U.S. 234 (1985) 13

Auer v. Robbins, 519 U.S. 452 (1997) 16

Bates v. United States, 522 U.S. 23 (1997) 10

BFP v. Resolution Trust Corp., 511 U.S. 531 (1994) 13

Catskill Mountains Chapter of Trout Unlimited, Inc. v. City of New York, 273 F.3d 481 (2d Cir. 2001) 17

Catskill Mountains Chapter of Trout Unlimited, Inc. v. City of New York, 451 F.3d 77 (2d Cir. 2006) 7

Crandon v. United States, 494 U.S. 152 (1990) 19

Friends of the Everglades, Inc. v. South Florida Water Management District, Slip Op., 2006 WL 3635465 (S.D. Fla.) 19

Gregory v. Ashcroft, 501 U.S. 452 (1991) 13

Miccosukee Tribe of Indians v. South Florida Water Management District, 280 F.3d 1364 (11th Cir. 2002) 11, 16, 18, 19

National Wildlife Fed'n v. Consumers Power Co., 862 F.2d 580 (6th Cir. 1988) 6, 9, 18

National Wildlife Fed'n v. Gorsuch, 693 F.2d 156 (D.C. Cir. 1982) ..... *passim*

PUD No. 1 v. Washington Dep't of Ecology, 511 U.S. 700 (1994) 15

Rapanos v. U.S.C.O.E., ___ U.S. ___, 126 S.Ct. 2208 (2006) 15

TABLE OF AUTHORITIES – Continued

Page

Rice v. Santa Fe Elevator Corp., 331 U.S. 218 (1947) 13

Russell v. Law Enforcement Assist. Admin., 637 F.2d 354 (5th Cir. 1981) 11

S.D. Warren Co. v. Maine Bd. of Enviro. Protection, ___ U.S. ___, 126 S.Ct. 1843 (2006) 7, 10, 13, 17

Solid Waste Agency of Northern Cook County v. United States Army Corps of Engineers, 531 U.S. 159 (2001) 13, 15

South Florida Water Management District v. Miccosukee, 541 U.S. 95 (2004) 2, 4

United States v. Bass, 404 U.S. 336 (1971) 13

United States v. Granderson, 511 U.S. 39 (1994) 19

United States v. Lopez, 514 U.S. 549 (1995) 14

United States v. Mead, 533 U.S. 218 (2001) 15, 16, 18

United States v. Plaza Health Lab., Inc., 3 F.3d 643 (2d Cir. 1993) 12

United States v. Thompson/Center Arms Co., 504 U.S. 505 (1992) 19

CONSTITUTION:

U.S. Const. amend. X 13, 15

STATUTES & REGULATIONS:

CWA § 101(a), 33 U.S.C. § 1251(a) 12

CWA § 101(b), 33 U.S.C. § 1251(b) 13, 14, 17

CWA § 101(g), 33 U.S.C. § 1251(g) 14

TABLE OF AUTHORITIES – Continued

Page

CWA § 301, 33 U.S.C. § 1311 ..... 6, 11

CWA § 301(a), 33 U.S.C. § 1311(a) 6

CWA § 302(a), 33 U.S.C. § 1312(a) 10

CWA § 303(d), 33 U.S.C. § 1313(d) 17

CWA § 304(F)(2)(f), 33 U.S.C. § 1314(F)(2)(f) 17

CWA § 309(c)(1), 33 U.S.C. § 1319(c)(1) 18

CWA § 309(c)(2), 33 U.S.C. § 1319(c)(2) 18

CWA § 319, 33 U.S.C. § 1329 17

CWA § 401, 33 U.S.C. § 1341 7

CWA § 402, 33 U.S.C. § 1342 ..... 6, 7, 11, 19

CWA § 502(7), 33 U.S.C. § 1362(7) 9

CWA § 502(12), 33 U.S.C. § 1362(12) 6, 9, 11

CWA § 502(19), 33 U.S.C. § 1362(19) 17

MISCELLANEOUS:

Brief for United States as *Amicus Curiae* in *Miccosukee*, 2003 WL 22137034 10

EPA Agency Interpretation on Applicability of Section 402 of the Clean Water Act to Water Transfers, August 5, 2005 16

EPA Evaluation Report, *Efforts to Manage Backlog of Water Discharge Permits Needed to be Accompanied by Program Integration*, Rpt. No. 2005-P-00018 3

TABLE OF AUTHORITIES – Continued

Page

EPA National Pollutant Discharge Elimination System (NPDES) Water Transfers Proposed Rule, 71 Fed. Reg. 32,887 (proposed June 7, 2006) (to be codified at 40 C.F.R. pt. 122) 1, 15

H.R. Rep. No. 92-911 (1972) 14

INTEREST OF THE *AMICI CURIAE*

Amici curiae[1] represent a consortia of state agencies, local governments and water management groups that are concerned with the Second Circuit's misinterpretation of the Clean Water Act, an interpretation that flatly contradicts the Act's plain language and the longstanding and consistent position of the United States Environmental Protection Agency. EPA National Pollutant Discharge Elimination System (NPDES) Water Transfers Proposed Rule, 71 Fed. Reg. 32,887 (proposed June 7, 2006) (to be codified at 40 C.F.R. pt. 122).

The Second Circuit's incorrect interpretive analysis shifts traditionally local rights and responsibilities to the federal government in an unprecedented expansion of federal regulatory jurisdiction over local land and water resource management in direct contravention of the Act's plain language, purposes and statutory scheme.

Long before and ever since the Clean Water Act was adopted in 1972, water resource managers, including these *Amici*, have worked to harness and allocate the Nation's waters, altering their natural movement, flow and circulation as part of each state's plan for the use, development and protection of land and water resources. Local police powers to manage and protect these vital natural resources for the public benefit are as fundamental as they are traditional. Today, extensive allocation systems, comprising over 2 million diversion facilities, connect and convey the nation's waters, often hundreds of miles, to

---

[1] This brief is being filed concurrently with the written consents of all parties. Counsel for a party did not author this brief in whole or in part. No person or entity, other than the *amici curiae*, their members, or their counsel, made a monetary contribution to the preparation and submission of this brief.

provide a myriad of public benefits, including land uses, water supply, and environmental protection.

Protecting and preserving the State's primary responsibilities for water resource management and for controlling pollution caused by land and water resource development is a cornerstone of the Clean Water Act's cooperative federalism model. By this statutory scheme, Congress intended to preserve rather then preempt local powers, carefully delineating a primarily supervisory role for the federal government, coupled with important, but limited, permitting jurisdiction.

The South Florida Water Management District (SFWMD) is one of five water management districts providing stewardship over Florida's public water resources. SFWMD establishes and implements the State's water policies throughout the vast Everglades ecosystem. It operates a comprehensive water management system of levees and canals designed to control and allocate waters throughout the watershed for public beneficial purposes. This allocation system was the subject of *South Florida Water Management District v. Miccosukee*, 541 U.S. 95 (2004), where the Court expressly acknowledged, yet declined to resolve, the question presented here.

The National Association of Flood and Stormwater Management Agencies (NAFSMA), established in 1979, represents more than 100 local and state flood control and stormwater management agencies. Its members are public agencies that protect lives, property and economic activity from storm and flood waters. NAFSMA is also focused upon the improvement of the health and quality of our nation's waters. Its mission is to advocate public policy, encourage technologies and conduct education programs to facilitate and enhance its member's public service.

Florida Association of Special Districts (FASD) is an association representing 89 special districts in the State of Florida, including 39 of the State's drainage districts. A large portion of the activities of drainage districts is the construction, operation and management of structures which transfer waters throughout their jurisdictions.

These *Amici*, as do all local water managers nationwide, have a strong interest in preserving the distinct roles intended by Congress for the federal and local governments – established and refined by statutory amendments and administrative practice for over 34 years of Clean Water Act development and implementation. By maintaining the proper role for each level of government, the courts can ensure that restoration and protection of the Nation's waters will proceed while respecting, preserving and protecting the primary rights and responsibilities of local governments to plan the use and development of land and water resources as Congress intended.

The problem with the Second Circuit's attempt to downplay the impacts of extending the National Pollutant Discharge Elimination System (NPDES) is not merely that it is wrong, for the expansion of federal permitting is not, as the court of appeals would have the nation believe, trivial. Federal permitting threatens to divert valuable resources from state, regional and local programs to an already backlogged federal system.[2] *Amici* remain equally concerned with the resulting shift of responsibility for pollution controls from local officials to federal decision-makers.

Whatever flexibility or discretion the NPDES program may offer – which is far less than suggested by the Second

---

[2] See, e.g., EPA Evaluation Report, *Efforts to Manage Backlog of Water Discharge Permits Need to be Accompanied by Program Integration*, Rpt. No. 2005-P-00018.

Circuit – local rights will inevitably be subordinated to the federal government, and in the end – due to the Act's citizen suit provisions – to the federal courts. It matters not what flexibility a permit writer may have if a local entity's traditional discretion to manage and move water, and the complex factors that play a part in the decision to do so, is transferred from those that are closest to the situation to a federal decision-maker that may or may not have a fair understanding of local needs or the willingness to consider them.

SUMMARY OF THE ARGUMENT

The Second Circuit's expansive interpretation of the NPDES program's "addition" requirement contradicts the Clean Water Act's plain language and structure, having been reached by misapplying or outright avoiding well-established interpretive rules, the critical application of which mandate a contrary construction than reached below.

Most fundamentally, the plain language of the Clean Water Act does not – as the Second Circuit pretends – plainly and unambiguously extend federal NPDES jurisdiction to regulate water transfers by local water resource agencies. Properly read, the Act's carefully crafted definitions manifest Congressional intent to limit federal NPDES jurisdiction to conveyances which add wastes to the Nation's waters. The NPDES program was never intended to control publicly-owned facilities that manage the movement of waters for public benefits.

Even if the Court does not adopt the *Amici's* plain reading – which was also advanced by the Federal Government in *Miccosukee* – it demonstrates, at bottom, that the Act does not *unambiguously* extend federal NPDES jurisdiction to public water transfers. To conclude otherwise, the Second Circuit ignored three key interpretive

doctrines designed to resolve statutory ambiguities and that should have guided the court's reasoning:

1. The Second Circuit disregarded the Clear Statement Rule which precludes the expansion of federal jurisdiction over traditionally local functions unless supported by a manifestly clear statement of Congressional intent. When Congress established a cooperative federalism model under which the State's retain primary responsibility for land and water resources, it clearly rejected a traditional preemption model. To the contrary, the Second Circuit's interpretation significantly and fundamentally shifts responsibilities from the states to the federal government, effectively expanding federal permitting jurisdiction to over tens of thousands, if not millions,[3] of water control facilities previously understood to have been the primary responsibility of local non-NPDES authorities.

2. The Second Circuit flatly declined any deference whatsoever to EPA, even after that agency clarified its longstanding and consistent position that Congress intended to leave the regulation of public water transfers to non-NPDES authorities in a formal guidance memorandum and proposed administrative rule. That failure was clear error.

3. Under the Rule of Lenity, the absence of any clear statement of Congressional intent should also have precluded expansion of the Act's federal criminal jurisdiction

[3] In 1987, EPA estimated over 2 million dams would be implicated. *Gorsuch* at 182. While the Court in *Gorsuch* hypothesized the number would be approximately 50,000. *Id.* Because NPDES extends to "any pollutant" it is not limited, as the *Gorsuch* court appears to believe, to only hydropower facilities or to those facilities that actually cause water quality problems. Regardless, a significant number of facilities will be impacted if the Second Circuit's opinion is not reversed under either view.

– of which the NPDES program is a key component – to govern state and local governments.

* * *

Left unchecked, the Second Circuit's decision will lead to a significant, unsupportable expansion of federal NPDES jurisdiction over state and local water resource management contrary to the intent of Congress and 34 years of consistent administrative practice. Any such shift in federal-state rights and responsibilities should be a product of a legislative, not judicial, process.

ARGUMENT

NPDES authorizes the Environmental Protection Agency to regulate the "discharge of any pollutants to the navigable waters." CWA §§ 301(a) & 402, 33 U.S.C. §§ 1311(a) & 1342. Congress defined the "discharge of pollutants" to mean "any addition of any pollutant to navigable waters from any point source." CWA § 502(12), 33 U.S.C. § 1362(12). This language does not, by its express terms, include transfers between navigable waters. Instead, CWA § 502(12) makes clear, in order to qualify as a "discharge of pollutants," the activity must cause an "addition" of a pollutant "to navigable waters." *National Wildlife Fed'n v. Consumers Power Co.*, 862 F.2d 580, 583 (6th Cir. 1988), citing *National Wildlife Fed'n v. Gorsuch,* 693 F.2d 156, 165 (D.C. Cir. 1982).

In this case, two of the defining elements that establish federal NPDES jurisdiction are indisputably absent. There is no "addition" "to navigable waters." As explained below, the fallacy of the Second Circuit's interpretation was to ignore the natural and ordinary meaning of these carefully crafted qualifiers.

1. THE CLEAN WATER ACT DOES NOT UNAMBIGUOUSLY EXTEND FEDERAL NPDES JURISDICTION TO PUBLIC WATER TRANSFER FACILITIES.

Last term the Court urged great care when interpreting the labyrinthine definitions of the Clean Water Act:

> It should also go without saying that uncritical use of interpretive rules is especially risky in making sense of a complicated statute like the Clean Water Act, where technical definitions are worked out with great effort in the legislative process. H.R. Rep. No. 92-911, p. 125 (1972) ("[I]t is extremely important to an understanding of [§ 402] to know the definition of the various terms used and a careful reading of the definitions . . . is recommended. Of particular significant [are] the words 'discharge of pollutants' ")

S.D. Warren Co. v. Maine Bd. of Enviro. Protection, ___ U.S. ___, 126 S.Ct. 1843, 1849-50 (2006). In *S.D. Warren*, this Court relied upon the Act's carefully crafted definitions to conclude that CWA § 401, which applies to all "discharges," was considerably more broad than CWA § 402, the NPDES program, which Congress expressly limited to "discharges of a pollutant." See *S.D. Warren*, at 1847.

Failing to follow this Court's model for interpreting statutes, particularly the CWA, the Second Circuit read the term "addition" in isolation and out of context from the key qualifying prepositional phrase "to navigable waters." *Catskill*, 451 F.3d 77, 81 (2d Cir. 2006). Just as the petitioner in *S.D. Warren* tried to ignore the prepositional phrase "of pollutants," the Second Circuit disregarded the adjectival effect of the prepositional phrase "to navigable waters."

a. The Adjectival Effect Of The Preposition "To" And Its Subjective Limits The Verb "Addition."

When contemplating the ordinary and natural meaning of the phrase "addition of *A* to *B*" it is commonly understood that *A* is not already joined with *B*. The "addition of *A* to *B*" contemplates *A* being moved from outside of *B* into *B*. The phrase "addition of *A* to *B*" does not contemplate the mere movement of *A* within *B*.

By analogy, consider the phrase "addition to United States." There is no addition of *A* to the United States if *A* is simply moved from one State to another. The movement of *A* from New York to Florida may be an addition to Florida, but it would not be considered an "addition" to the whole of the "United States." To constitute an "addition . . . to United States," something must enter from outside of the United States. This principle is unaffected by the reality that the United States is not monolithic, but rather comprised of fifty meaningfully distinct States.

The ordinary and natural meaning of the phrase "addition of *A* to *B*" can be explained in other terms. The adjectival effect of incorporating the prepositional phrase "to *B*" designates the subjective, *B*, as the relevant receptacle and, therefore, contemplates some *A* being added from outside of *B*, and not the mere movement of *A* from one part of *B* to another.

What is denominated to be the receptacle defines the scope of activities that constitute an addition to it. Invoking the above analogy, the addition of *A* to United States, captures the movement of *A* from outside the United States into the United States, but not the movement of *A* within the United States. To encompass the movement of *A* between states, the receptacle must be more narrowly and specifically defined, e.g., the addition of *A* to "any

state." By instead designating the "United States" as a whole to be the relevant receiving unit, rather than "any state," the obvious intention would be to reach only those activities that move *A* from outside the United States into the United States and not those activities which merely add *A* from one state to another.

b. The Adjectival Effect Of Congress Having Chosen The Prepositional Phrase "To Navigable Waters" Excludes Water Transfers From NPDES.

Congress plainly used the prepositional phrase "to navigable waters" to qualify the noun "addition" and, thereby, designated the "navigable waters" as a whole to be the relevant receptacle for NPDES purposes. It further defined "[t]he term 'navigable waters' to mean *the* waters of the United States, including the territorial seas." CWA § 502(7), 33 U.S.C. § 1362(7) (emphasis supplied). As a result, an "addition to navigable waters" requires something to be introduced from outside the navigable waters. *Gorsuch*, 693 F.2d 156; *Consumers Power*, 862 F.2d at 588.

Congress further confirmed its intent to treat the navigable waters as a whole for NPDES purposes by omitting the modifier "any" from before the terms "navigable waters" in the definition for "discharge of a pollutant" – a modifier otherwise used to qualify every other noun in the definition and, if used, would have extended NPDES to prohibit discharges of navigable water between distinct water bodies. CWA § 502(12), 33 U.S.C. § 1362(12). The Federal Government as *amicus* in *Miccosukee* explained:

> [The CWA's] use of the modifier "any" with reference to "addition," "pollutant," and "point source" expresses Congress's understanding that the

> various types of additions, pollutants, and point sources are all within the Clean Water Act's regulatory reach. The *absence* of the modifier "any" in conjunction with "navigable waters," by contrast, signifies Congress's further understanding that "the waters of the United States" should be viewed as a whole for purposes of NPDES permitting requirements.

Brief for United States as *Amicus Curiae* in *Miccosukee*, 2003 WL 22137034 at 19.[4]

When "Congress fine-tunes its statutory definitions, it tends to do so with a purpose in mind." *S.D. Warren v. Maine Bd. Enviro. Prot.*, ___ U.S. ___ 126 S.Ct. 1843, 1852 (2006) citing *Bates v. United States*, 522 U.S. 23, 29-30, 118 S.Ct. 285, 139 L.Ed.2d 215 (1997) (if "Congress includes a particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion" (internal quotation marks omitted)). Elsewhere in the Clean Water Act, when Congress intended to address individual navigable waters it proved quite capable. E.g., CWA § 302(a), 33 U.S.C. § 1312(a), ("a specific portion of the navigable waters"). Here Congress did not prohibit the addition of pollutants

---

[4] The Second Circuit incorrectly believed "remand [in *Miccosukee*] would be unnecessary if there were no legally significant distinction between inter- and intra-basin transfers." *Catskill II*, 451 F.3d 77, 83 (2d Cir. 2006). To the contrary, this Court noted it was the Second Circuit's distinction between water bodies that would be irrelevant under the federal government's interpretation. *Miccosukee*, 541 U.S. at 106. Remand was necessary for two reasons: 1) even under the legal standards most favorable to the respondents the earlier decisions could not stand **and** 2) to provide the lower courts an opportunity to fairly and fully evaluate the federal government's statutory interpretation. *Miccosukee*, 541 U.S. at 112.

to "waters," "receiving waters," "any navigable waters," "a specific portion," "a water body" (distinct or otherwise), or any similar language of apportionment that would have extended NPDES in the manner urged by Respondents.

Under usual rules of statutory construction, use of two different terms is presumed to be intentional. *Gorsuch* at 172, citing *Russell v. Law Enforcement Assist. Admin.*, 637 F.2d 354, 356 (5th Cir. 1981). The concept of "distinct water bodies" and "receiving waters" simply does not reside in the text of CWA §§ 301, 402 or 502(12), 33 U.S.C. §§ 1311, 1342 & 1362(12). As the District of Columbia Circuit noted in *Gorsuch*:

> It does not appear that Congress wanted to apply the NPDES system wherever feasible. Had it wanted to do so, it could easily have chosen suitable language, *e.g.*, 'all pollution released through a point source.' Instead * * * the NPDES system was limited to 'addition' of 'pollutants' 'from' a point source.

693 F.2d at 176.

* * *

By changing the relevant receptacle from "navigable waters" to "water body," as a means to reach inter-basin transfers, the Second Circuit has changed the natural and ordinary meaning of the Act. The Eleventh Circuit made a similar error in *Miccosukee* when it declared the "relevant waters" to be the "receiving waters." 280 F.3d at 1368. Instead of requiring an addition to the "navigable waters," the vacated Eleventh Circuit's analysis changed the focus and expanded NPDES to include additions of pollutants to any "waters." As we have shown, these partial constructions are contrary to the natural and ordinary meaning of "addition ... to navigable waters." Congress did not expect NPDES to protect any "receiving waters" or all individual "waters," but targeted activities which add pollutants to the

whole of the "navigable waters." Thus, the Second Circuit's construction mistakenly concludes *ipso facto* that an "addition" of a pollutant to "part of the navigable waters" is an addition to the whole of "navigable waters." It is not.

To support its "plain reading," the Second Circuit relies heavily upon the overarching purpose of the Clean Water Act, "to restore and maintain the chemical, physical and biological integrity of the nation's waters." CWA § 101(a), 33 U.S.C. § 1251(a). "Caution is always advisable in relying on a general declaration of purpose to alter the apparent meaning of a specific provision." *United States v. Plaza Health Lab., Inc.*, 3 F.3d 643, 647 (2d Cir. 1993). As noted in *Gorsuch*, the narrow interpretive question posed by this case may not be resolved merely by simple reference to this admirable goal. *Id.* (citing *National Wildlife Federation v. Gorsuch*, 693 F.2d 156, 178 (D.C. Cir. 1982) ("it is one thing for Congress to announce a grand goal, and quite another for it to mandate full implementation of that goal").

The Clean Water Act's carefully crafted definitions plainly limit the NPDES program to conveyances which discharge pollutants into the navigable waters, specifically excluding facilities used only to connect and convey navigable waters for resource management purposes. The Second Circuit's contention that the Act's "plain language" unambiguously reaches inter-basin water transfers is simply unsupportable.

2. WELL-ESTABLISHED AND FUNDAMENTAL RULES OF STATUTORY INTERPRETATION CONFIRM EPA'S STATUTORY INTERPRETATION.

The above textual analysis demonstrates, at bottom, that the NPDES program does not unambiguously extend to water transfers. A contrary conclusion led the Second Circuit to ignore three well-established interpretive rules,

each of which when properly applied confirms *Amici's* interpretation and, therefore, should guide this Court to reverse the decision below.

a. The Clear Statement Rule Prohibits The Extension Of NPDES To State And Local Water Management.

To uphold protections of the Tenth Amendment of the United States Constitution, the Clear Statement Rule of statutory interpretation provides that "if Congress intends to alter the 'usual constitutional balance between the States and the Federal Government,' it must make its intention to do so 'unmistakably clear in the language of the statute.'" *Gregory v. Ashcroft*, 501 U.S. 452, 460-61 (1991), quoting *Atascadero State Hospital v. Scanlon*, 473 U.S. 234, 242 (1985). This fundamental rule of statutory construction provides that "unless Congress conveys its purpose clearly, it will not be deemed to have significantly changed the federal-state balance." *United States v. Bass*, 404 U.S. 336, 349 (1971); see also *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947) (a federal statute does not supersede "the historic police powers of the States * * * unless that was the clear and manifest purpose of Congress"); *BFP v. Resolution Trust Corp.*, 511 U.S. 531, 544 (1994). "It is incumbent upon the federal courts to be certain of Congress' intent before finding that Federal law overrides" this balance. *Gregory*, 501 U.S. at 460.

The Clean Water Act provides for a system that respects the State's concerns. *S.D. Warren*, 126 S.Ct. at 1853 citing CWA § 101(b), 33 U.S.C. § 1251(b). Indeed, the Court has applied the "clear statement rule" to determine the meaning of provisions of the Clean Water Act. *Solid Waste Agency of Northern Cook County v. United States Army Corps of Engineers*, 531 U.S. 159, 173

(2001) ("SWANCC"). Noting, the Courts have a "particular duty to ensure that the federal-state balance is not destroyed with respect to "traditional concern[s] of the States" such as water management and allocation. See *United States v. Lopez*, 514 U.S. 549, 580-581 (1995) (Kennedy, J., concurring). That duty is heightened in the case of the CWA because Congress made explicit its "policy . . . to recognize, preserve, and protect the primary responsibilities and rights of States to prevent, reduce, and eliminate pollution, to plan the development and use (including restoration, preservation, and enhancement) of land and water resources." CWA § 101(b), 33 U.S.C. § 1251(b). Congress further directed that "the authority of each State to allocate quantities of water within its jurisdiction shall not be superseded, abrogated or otherwise impaired" by the Act. CWA § 101(g), 33 U.S.C. § 1251(g); see *SWANCC* at 174 (rather than "expressing a desire to readjust the federal-state balance" by extending jurisdiction, Congress chose to preserve state's rights over land and water resources under § 101(b)).

The States' traditional interest in water management is at its peak where the control of pollution implicates vital water supplies. Water is among each state's most basic resources. "Permitting the United States government to claim federal jurisdiction" over the transfer of water to supply the City of New York "would result in a significant impingement of the States' traditional and primary power over land and water use." *SWANCC*, 531 U.S. at 174. Leaving water quality impacts from water management systems to the states "would reduce federal/state friction and would permit states to develop integrated water management plans that address both quantity and quality." *Gorsuch*, at 179, citing H.R. Rep. No. 92-911 at 96 (1972).

The burdens of federal Clean Water Act permitting are not, as the Second Circuit would have the world believe, trivial. *Solid Waste Agency of Northern Cook County v. United States Army Corps of Engineers*, 531 U.S. 159, 161 (2001) ("Permitting the United States government to claim federal jurisdiction" over State water transfers "would result in a significant impingement of the States' traditional and primary power over land and water use"); See also, *Rapanos v. U.S.C.O.E.*, ___ U.S. ___, 126 S.Ct. 2208, 2214 (2006) (J. Scalia) ("The burden of federal regulation [under §404] is not trivial").

Far from making a "clear statement" explicitly stripping the States of their traditional powers over water management and land use planning, the CWA recognized that the state and federal governments have distinct roles to play. *PUD No. 1*, 511 U.S. at 704. Thus, at the very least, the CWA fails to manifest any clear statement that facilities such as those involved in this matter, which merely connect and convey navigable waters for public purposes, were intended to be regulated under NPDES. Under the Tenth Amendment and its Clear Statement Rule of statutory construction there is an insufficient basis to extend the federal NPDES to regulate the fundamental and primary State responsibility of managing navigable waters for public purposes.

b. Deference Should Have Been Given To The Longstanding Practice, Legal Interpretation And Proposed Rule Of The Implementing Agencies.

Multiple factors inform the extent to which a reviewing court owes deference to an agency's interpretation of a statute. *United States v. Mead*, 533 U.S. 218, 235 (2001). Courts owe "respect proportional to [the interpretation's]

power to persuade" due to its "thoroughness, logic, and expertness, its fit with prior interpretations, and any other sources of weight." *Id.* All of these factors heavily favor deference in this case. EPA presents in its preamble to the Proposed Rule a thorough, logical and detailed analysis reflecting their particular expertise in the subject. Proposed Rule, 71 Fed. Reg. at 32890 (June 7, 2006); *EPA Agency Interpretation on Applicability of Sec. 402 of the Clean Water Act to Water Transfers*, Aug. 5, 2005 (Legal Interpretation). In fact, no factor weighs against deference.

EPA's litigating position, Legal Interpretation and Proposed Rule are "in no sense '*post hoc* rationalizations'" but a long held and frequently reiterated view "reflect[ing] the agency's fair and considered judgment." *Auer v. Robbins*, 519 U.S. 452, 462 (1997); e.g., *Gorsuch*, 693 F.2d at 165, 167 (EPA's interpretation "was made contemporaneously with the passage of the Act, and has been consistently adhered to since").[5] This Court in *Miccosukee* invited EPA to speak by noting the absence of any administrative document where EPA has espoused its position. 541 U.S. at 107. This Court now has just that document, EPA's Proposed Rule on Water Transfers, which holistically evaluated the statute and concluded that Congress intended to leave water transfers to the CWA's non-NPDES authorities. EPA's thorough and expert analysis should not have been so lightly ignored by the Second Circuit.

---

[5] The Second Circuit misread this Court's opinion in *Miccosukee* believing it to have "pointed out" that EPA once had come to a conclusion opposite of its Legal Interpretation. What this Court had observed is that an amicus brief filed by "ex-EPA officials" *argued* that EPA had once been inconsistent. *Miccosukee*, 541 U.S. at 107. Tellingly absent from the record – because it does not exist – is any example where EPA acted inconsistent with its position as set forth in EPA's Proposed Rule.

Had the Second Circuit considered EPA's analysis and the overall statutory scheme, as required, it would have realized that Congress expressly provided specific non-NPDES remedies to address concerns with the movement of polluted waters into pristine waters. See, e.g., CWA §§ 319, 303(d) & 304(F)(2)(f), 33 U.S.C. §§ 1329, 1313(d) & 1314(F)(2)(f). As this Court recently reiterated, "the [Clean Water] Act does not stop at controlling the 'addition of pollutants,' but deals with 'pollution' generally, see § 1251(b), which Congress defined to mean 'the man-made or man-induced alteration of the chemical, physical, biological and radiological integrity of water.' §1362(19)." *S.D. Warren,* 126 S.Ct. at 1852-53. The CWA accomplishes its purposes through a complex and comprehensive suite of programs of which NPDES is but one tool. Proper review of the entire statute also reveals, as EPA's Proposed Rule explains in detail, that "the specific statutory provisions addressing the management of water resources – coupled with the overall statutory structure – support the conclusion that Congress did not intend for water transfers to be regulated under [NPDES]." Proposed Rule, 71 Fed. Reg. at 32890 (June 7, 2006).

EPA's Proposed Rule is consistent with the longstanding interpretation of EPA as approved by the District of Columbia and Sixth Circuits in *Gorsuch,* 693 F.2d 156 (1982) and *Consumers Power,* 862 F.2d 580 (1988). Those decisions in no way turned upon the waters being naturally parts of the same water body, i.e. what the Second Circuit dubbed an "assumption of sameness." *Catskill I,* 273 F.3d at 492. An "assumption" that was not made by either Court, but rather invented by the Second Circuit. Quite to the contrary, *Gorsuch* and *Consumers Power* both identify the transferred and receiving waters as different bodies of water and discuss at length distinctions among them. As EPA puts it, a "point source must *introduce* the

pollutant into navigable water from the outside world; dam-caused pollution, in contrast, merely passes through the dam from *one body of navigable water* (the reservoir) *into another* (the downstream river)." *Gorsuch,* 693 F.2d at 165 (emphasis supplied). In fact, the interpretation accepted in *Gorsuch* and *Consumers Power* cannot be fairly distinguished on any material point.

EPA's Legal Interpretation and Proposed Rule ratify these *Amici's* interpretation of the NPDES program and underscore our understanding with EPA that Congress never intended to impose NPDES regime upon State, regional and local water managers tasked with controlling navigable waters. Were the Court not to accept outright the *Amici* and the federal government's reading of the "addition" requirement to represent its ordinary and natural meaning, the Court should nonetheless defer to the agency's official position expressed in both well reasoned official agency documents, i.e., the Legal Interpretation and the Proposed Rule. Those documents, evidencing and memorializing EPA's longstanding position and the rulemaking process were entitled to at least *Skidmore/ Mead* deference.

c. The Clean Water Act's Severe Criminal Penalties Require It To Be Narrowly Construed.

The CWA is enforceable through criminal as well as civil penalties. Violations carry fines up to $100,000 per day and six years' imprisonment. CWA § 309(c)(2), 33 U.S.C. § 1319(c)(2). Even a negligent violation can bring heavy fines and two years in prison. *Id.* § 1319(c)(1). Under the Second Circuit's interpretation anyone managing navigable waters so as to change their natural flow and divert water into another distinct water body commits a criminal offense. The Eleventh Circuit in *Miccosukee* noted

SFWMD may be subject to criminal penalties if it failed to comply with the Clean Water Act. 280 F.3d 1364, 1371.

Criminal statutes are subject to a rule of strict construction and the rule of lenity, which require resolving doubts about a statute's meaning against the government. *Crandon v. United States*, 494 U.S. 152, 158 (1990). These rules apply in civil cases to statutory provisions, like the NPDES program, CWA § 402, that have both criminal and civil consequences. See *United States v. Thompson/Center Arms Co.*, 504 U.S. 505, 518 n.10 (1992) (plurality) (applying the rule of lenity to interpret a "tax statute [with] criminal applications"; the rule is one "of statutory construction[,] * * * not a rule of administration calling for courts to refrain in criminal cases from applying statutory language that would have been held to apply if challenged in civil litigation"); *id.* at 519 (Scalia and Thomas, JJ., concurring).

Because the Second Circuit's holding is hardly an "unambiguously correct" interpretation of the CWA (*United States v. Granderson*, 511 U.S. 39, 54 (1994)), and because that expansive interpretation exposes these *Amici* and countless other public water managers to criminal sanctions, the rules of lenity and strict construction require it be firmly rejected.

3. THE COURT SHOULD RESOLVE THIS MATTER THROUGH THIS CASE.

New York City is threatened with over five million dollars in fines and many more millions of dollars in compliance costs if their Petition is not granted and the Second Circuit's erroneous decision reversed. Courts in Florida have followed the Second Circuit and, incorporating many of its interpretive errors, expanded NPDES even further by finding even intra-basin transfers of water between related water bodies are subject to permitting. *Friends of the*

Everglades, Inc. v. South Florida Water Management District, Slip Op., 2006 WL 3635465 (S.D. Fla.). Other suits are pending or threatened. There is no relief in sight from EPA's rulemaking given the courts of appeals dismissive view of EPA's authority and its mistaken impression that the statutory language unambiguously supports an interpretation opposite to that of EPA's. As demonstrated by the grave concern of *Amici* throughout the nation, from many sectors of society, the Second Circuit's novel interpretation of the Clean Water Act's NPDES program should be corrected sooner rather then later.

CONCLUSION

For the above stated reasons, the Court should grant the City of New York's petition and issue a writ of certiorari to the Second Circuit to correct the injustice of that court's decision.

Respectfully submitted,

JAMES E. NUTT, ESQ.
Counsel of Record for all Amici
SOUTH FLORIDA WATER MANAGEMENT DISTRICT
3301 Gun Club Road
West Palm Beach, FL 33406
(561) 682-6253

KIRK HOWARD BETTS, ESQ.
NATIONAL ASSOC. OF FLOOD AND STORMWATER MANAGEMENT AGENCIES
BETTS & HOLT LLP
West Tower – 10th Floor
1333 H Street, NW
Washington, D.C. 20005
(202) 530-3380

TERRY E. LEWIS, ESQ.
FLA. ASSOC. OF SPECIAL DISTRICTS
LEWIS, LONGMAN & WALKER, P.A.
1700 Palm Beach Lakes Blvd., Ste. 1000
West Palm Beach, FL 33401
(561) 840-8020

(4)

FILED

JAN 26 2007

OFFICE OF THE CLERK
SUPREME COURT, U.S.

No. 06-729

In The

Supreme Court of the United States

CITY OF NEW YORK, *et al.*,

Petitioners,

v.

CATSKILL MOUNTAINS CHAPTER OF TROUT UNLIMITED, LTD., *et al.*,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit

Brief *Amici Curiae* Of National Water Resources Association, Western Urban Water Coalition, Western Coalition Of Arid States, Association Of California Water Agencies, [California] State Water Contractors, Idaho Water Users Association, Arizona Department Of Water Resources, Central Arizona Water Conservation District, City And County Of Denver Acting By And Through Its Board Of Water Commissioners, Albuquerque Bernalillo County [New Mexico] Water Utility Authority, Metropolitan Water District Of Salt Lake & Sandy [Utah], Central Utah Water Conservancy District, Fremont Madison [Idaho] Irrigation District, Pioneer Irrigation District, El Dorado Irrigation District, Northern Colorado Water Conservancy District, City Of Aurora, Yuba County Water Agency, Yolo County Flood Control & Water Conservation District, And Browns Valley Irrigation District, In Support Of Petitioners

PETER D. NICHOLS*
PEGGY E. MONTAÑO
ROBERT V. TROUT
TROUT, RALEY, MONTAÑO, WITWER & FREEMAN, P.C.
1120 Lincoln Street, Suite 1600
Denver, Colorado 80203
303-861-1963

Counsel for National Water Resources Association, Northern Colorado Water Conservancy District

**Counsel of Record for all Amici*

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

DOUGLAS K. MILLER,
General Counsel
SUZANNE TICKNOR,
Deputy General Counsel
CENTRAL ARIZONA WATER
CONSERVATION DISTRICT
P.O. Box 43020
Phoenix, Arizona 85080

GREGORY K. WILKINSON, ESQ.
BEST BEST & KRIEGER LLP
3750 University Avenue,
Suite 400
Riverside, California 92502
Counsel for State Water Contractors

NORMAN M. SEMANKO, ESQ.,
Attorney at Law
1010 W. Jefferson St.,
Suite 101
Boise, Idaho 83702
Counsel for Idaho Water Users Association

PATRICIA L. WELLS,
General Counsel
CITY AND COUNTY OF
DENVER, BOARD OF
WATER COMMISSIONERS
1600 West 12th Avenue
Denver, Colorado 80204

CHRISTINE MCKENNEY,
Assistant City Attorney
CITY OF AURORA
15151 E. Alameda Parkway,
First Floor
Aurora, Colorado 80012

GUY R. MARTIN, ESQ.
PERKINS COIE LLP
607 14th Street NW
Washington, DC 2005
Counsel for Western Urban Water Coalition

WHITNIE HENDERSON, ESQ.
ASSOCIATION OF CALIFORNIA
WATER AGENCIES
910 K Street, Suite 100
Sacramento, California
95814

SHAWN E. DRANEY, ESQ.
SNOW, CHRISTENSEN
& MARTINEAU
10 Exchange Place
Eleventh Floor
P.O. Box 45000
Salt Lake City, Utah 84145
Counsel for Metropolitan Water District of Salt Lake & Sandy

MARIA O'BRIEN, ESQ.
MODRALL SPERLING
500 Fourth Street NW
P.O. Box 2168
Albuquerque, New Mexico
87103
Counsel for Albuquerque Bernalillo County Water Utility Authority

THOMAS D. CUMPSTON, ESQ.,
General Counsel
EL DORADO IRRIGATION
DISTRICT
2890 Mosquito Road
Placerville, California 95667

W. PATRICK SCHIFFER, ESQ.,
Chief Counsel
GREGG A. HOUTZ, ESQ.,
Deputy General Counsel
ARIZONA DEPARTMENT
OF WATER RESOURCES
3550 North Central Avenue
Phoenix, Arizona 85012

LAWRENCE S. BAZEL, ESQ.
BRISCOE, IVESTER & BAZEL, LLP
155 Sansome Street,
7th Floor
San Francisco, California
94104
Counsel for Western Coalition of Arid States

JERRY R. RIGBY, ESQ.
RIGBY, THATCHER, ANDRUS,
RIGBY & MOELLER,
CHARTERED
25 N. 2nd E.
P.O. Box 250
Rexburg, Idaho 82440
Counsel for Fremont Madison Irrigation District

STEVEN E. CLYDE, ESQ.
CLYDE SNOW SESSIONS
& SWENSON, PC
One Utah Center
Thirteenth Floor
201 South Main Street
Salt Lake City, Utah 84111
Counsel for Central Utah Water Conservancy District

SCOTT L. CAMPBELL, ESQ.
MOFFATT THOMAS BARRETT
ROCK & FIELDS
CHARTERED
101 South Capitol Boulevard,
10th Floor
P.O. Box 829
Boise, Idaho 83701
Counsel for Pioneer Irrigation District

RYAN S. BEZERRA, ESQ.
BARTKIEWICZ, KRONICK
& SHANAHAN
A Professional Corporation
1011 Twenty-Second Street
Sacramento, California
95816
Counsel for Yuba County Water Agency, Yolo County Flood Control & Water Conservation District, and Browns Valley Irrigation District

QUESTION PRESENTED

Amici and other Western water users rely upon thousands of water transfers to deliver trillions of gallons of water daily pursuant to State water allocations to meet essential domestic, municipal, industrial, agricultural and other demands. The question *Amici* will address is: whether extending the National Pollutant Discharge Elimination System to water transfers would violate Congress' specific instruction in the Clean Water Act, 33 U.S.C. §§ 1251(g), not to supersede or abrogate individual water allocations of the States.

TABLE OF CONTENTS

Page

INTEREST OF *AMICI CURIAE* 1

SUMMARY OF ARGUMENT 12

ARGUMENT 13

REQUIRING NPDES PERMITS FOR WATER TRANSFERS WOULD SUPERSEDE OR ABROGATE STATE WATER ALLOCATIONS BECAUSE PERMIT CONDITIONS WOULD EFFECTIVELY PROHIBIT THE FULL EXERCISE OF MANY STATE WATER RIGHTS 14

A. WATER QUALITY STANDARDS 14

B. THE IMPACT ON WATER TRANSFERS 16

C. ANTIDEGRADATION REQUIREMENTS 18

D. BEST MANAGEMENT PRACTICES 19

CONCLUSION 19

TABLE OF AUTHORITIES

Page

CASES

Catskill Mountains Chapter of Trout Unlimited, Inc. v. City of New York, 451 F.3d 77 (2d Cir. 2006) 1, 12, 14

Committee to Save Mokelumne River v. E. Bay Mun. Util. Dist., 13 F.3d 305 (9th Cir. 1993) 15

Northwest Indian Cemetery Protective Ass'n v. Peterson, 764 F.2d 581 (9th Cir. 1985) 19

South Fla. Water Mgmt. Dist. v. Miccosukee Tribe of Indians, 541 U.S. 95 (2004) 12, 13, 14

STATUTES

33 U.S.C. § 1251(g) (2006) 13

33 U.S.C. § 1311(b)(1)(C) 14, 19

33 U.S.C. § 1313(e)(3)(A) 14, 19

33 U.S.C. § 1314(e) 19

REGULATIONS

40 C.F.R. § 122.4(d) (2006) 14, 19

40 C.F.R. § 122.44(d)(1)(i) 14

40 C.F.R. § 130.2(m) 16

40 C.F.R. § 131.12(a)(2) 18

5 COLO. CODE REGS. § 1002-31.16 (2005) 15

RULES

Supreme Court Rule 37.2(a) 1

Supreme Court Rule 37.6 1

TABLE OF AUTHORITIES – Continued

Page

OTHER AUTHORITIES

Brief for Colorado et al. as *Amici Curiae* 12, 13

INTEREST OF *AMICI CURIAE*

Amici Curiae – Western water users associations and western water users – submit this brief in support of New York City's Petition for a Writ of Certiorari seeking reversal of the lower court's decision in *Catskill Mountains Chapter of Trout Unlimited, Inc. v. City of New York*, 451 F.3d 77 (2d Cir. 2006) ("*Catskill II*").[1]

West of the 100th Meridian,[2] the nation is generally arid; that is, it receives less than the thirty inches of annual precipitation necessary to sustain non-irrigated agriculture. Further, since most precipitation in the west falls as snow, it is necessary to capture water where and when the snow melts, invariably far from the major urban and agricultural centers that need the water. Hence, it is compulsory to transfer water through complex systems of manmade and natural conveyances and reservoirs. Water transfers allow the west to sustain its cities, farms, and ranches. Without this elaborate system of water transfers, many nationally important agricultural regions could not grow crops, including the Central and Imperial Valleys of California, Weld and Larimer Counties in Colorado, and the Snake River Valley of Idaho. Similarly, many of the nation's great cities could not exist, including Albuquerque, Cheyenne, Denver, Los Angeles, Phoenix, Reno, Salt Lake City, and San Francisco.

Under individual water rights determined pursuant to State water law, *Amici* and countless other public and private entities in the western United States divert water

---

[1] Pursuant to Rule 37.6 of this Court, *Amici* represent that counsel for *Amici* authored this brief in its entirety and that no person or entity other than *Amici* and their representatives made any monetary contribution to the preparation or submission of this brief. Pursuant to Rule 37.2(a) consent of all parties has been given and the letters have been filed with the Clerk of this Court.

[2] The 100th Meridian forms the eastern boundary of the Texas panhandle, and splits the states of North Dakota, South Dakota, Nebraska, Kansas, Oklahoma, and Texas.

from natural streams and lakes.[3] Many then transfer water through manmade tunnels, canals, and pipelines into other natural streams and lakes to meet the domestic, agricultural, commercial, and industrial water needs of residents in another watershed. These water transfers range from a few hundred thousand gallons per year needed to irrigate a high-mountain pasture in northern Idaho to 2.4 trillion gallons per year delivered by California's Central Valley Project for municipal, irrigation, and other uses. Water transfers may be as commonplace as the diversion of water from a river into a nearby (but hydrologically separate) stream for delivery to a nearby town or field, or as massive as the transfer of Sacramento River water by the Federal Central Valley Project and State Water Project to serve citizens throughout northern, central, and southern California. Extending the National Pollutant Discharge Elimination System ("NPDES") program of the Clean Water Act ("CWA" or "Act") could severely disrupt *Amici's* necessary water transfers to meet essential domestic, agricultural, commercial, and industrial water demands throughout the West, which would supersede or abrogate such transfers.

The National Water Resources Association ("NWRA") is a voluntary organization of western state water associations, whose members include cities, towns, water conservation and conservancy districts, irrigation and reservoir companies, ditch companies, farmers, ranchers and others with an interest in both water quantity and water quality issues in the western United States. Its members range from the Metropolitan Water District of Southern California, which serves most of California's south coast, an area of

---

[3] The States allocate the waters within their boundaries for "beneficial" or "reasonable" use under one of two prevailing legal doctrines. Eastern States, like New York, use variations of the riparian doctrine, whereas the arid Western States generally follow the prior appropriation doctrine. Under that doctrine, the States grant specific water users the right to use particular quantities of public water resources for specific purposes.

3,328,000 acres, to the farmer who owns the McCormick Rowe Ditch in St. Anthony, Idaho, which is used to irrigate 240 acres of farmland.[4] NWRA members directly engage in, or rely on, water from innumerable water transfers.[5] If these water transfers were effectively halted or became prohibitively expensive to operate due to NPDES program requirements, NWRA members would be unable to meet essential domestic, agricultural and industrial water demands.

The Western Urban Water Coalition ("WUWC") is an association of the largest municipal water utilities in the western United States. The goal of WUWC members is to provide a reliable, high-quality urban water supply for present and future water users. WUWC members[6] own and operate water management, water supply and hydroelectric projects. These projects consist of water conduits and reservoirs, including water transfer facilities. The continued,

---

[4] Other NWRA members include the Arizona Cattlemen's Association (AZ), the Central Arizona Water Conservation District (AZ), Coachella Valley Water District (CA), Glen-Colusa Irrigation District (CA), Imperial Irrigation District (CA), East Bay Municipal Utility District (CA), San Diego County Water Authority (CA), Colorado River Water Conservation District (CO), City of Fort Collins (CO), Montana Water Users Association (MT), Garrison Diversion Conservation District (ND), Middle Rio Grande Conservancy District (NM), Las Vegas Valley Water District (NV), Owyhee Irrigation District (OR), Central Oregon Irrigation District (OR), OWRC (OR), Brazos River Authority (TX), Provo River Water Users Association (UT), and Methow Valley Irrigation District (WA).

[5] NWRA has maintained a close working relationship with the U.S. Bureau of Reclamation ("Reclamation"), as many of its members are the operators or beneficiaries of Reclamation water projects, including projects with significant water transfer components, for example Colorado's Fryingpan Arkansas Project, California's Friant-Kern Canal (part of Central Valley Project), and New Mexico's San Juan-Chama Project.

[6] WUWC members currently serve over 30 million urban water consumers in the states of Arizona, California, Colorado, Nevada, Utah and Washington, including those residing within the cities of Phoenix, Denver, San Diego, Los Angeles, San Francisco, Oakland, Las Vegas, Salt Lake City, Tucson and Seattle.

unimpeded operation of these facilities is essential to the continued ability of WUWC members to serve the water needs of the major population centers of the west.

The Western Coalition of Arid States ("WESTCAS") is the voice of water quality in the arid west and an advocate for laws, regulations and policies that ensure sustainable supplies of water for the arid west and protect public health and the environment. WESTCAS was formed over 12 years ago in order to appropriately address water quality issues in an area of the country where precipitation is oftentimes less than ten inches per year and, as a consequence, unique arid ecosystems are the norm. Many WESTCAS members[7] depend upon water transfers both to meet municipal water supply requirements and to sustain, by virtue of water transport or wastewater discharge, riparian ecosystems that have developed in ephemeral or intermittent stream systems.

The Association of California Water Agencies ("ACWA") is a voluntary, statewide non-profit association of 440 public water agencies. Together, these agencies are responsible for more than 90 percent of the water delivered in the state. In addition to public agency members, ACWA also includes 28 affiliate members, consisting of mutual water companies and other non-public, non-profit water related agencies, and 302 associate members including firms and corporations in the law and engineering fields with an interest in California water issues. ACWA's mission is to assist its members in promoting the development, management and reasonable beneficial use of good quality water at the lowest practical cost in an environmentally balanced manner. Although the

---

[7] WESTCAS members include numerous water and wastewater agencies, such as the City of Phoenix (AZ), Tucson Water (AZ), the Salt River Project (AZ), Eastern Municipal Water District (CA), Los Angeles County Sanitation District (CA), the Sweetwater Authority (CA), Denver Metro Wastewater District (CO), Clark County Water Reclamation District (NV), the cities of Albuquerque and Santa Fe (NM), and El Paso Water Utilities (TX).

largest conveyance facilities in California are often the focus of attention, there are literally thousands of small conveyance systems in the state whose operators have used natural channels to convey developed waters for over a century.

The [California] State Water Contractors ("SWC") represents 27 of the 29 public water agencies operating within California who contract with the California Department of Water Resources for water supplies from the State Water Project ("SWP").[8] The SWP diverts water from the Sacramento-San Joaquin Delta through the California Aqueduct for distribution to the San Joaquin Valley and delivery over the Tehachapi Mountains into southern California. The Project supplies water for drinking, commercial, industrial and agricultural purposes to public water agencies, encompassing a population of over 22 million Californians – about two-thirds of the State's population – and over 750,000 acres of farm land throughout the San Francisco Bay area, the Central Valley, and Southern California. The SWP constitutes a significant portion of the supplies available to SWC members. As a result, the SWC is very concerned with matters affecting the SWP, the Sacramento-San Joaquin Delta, and tributaries to the Delta.

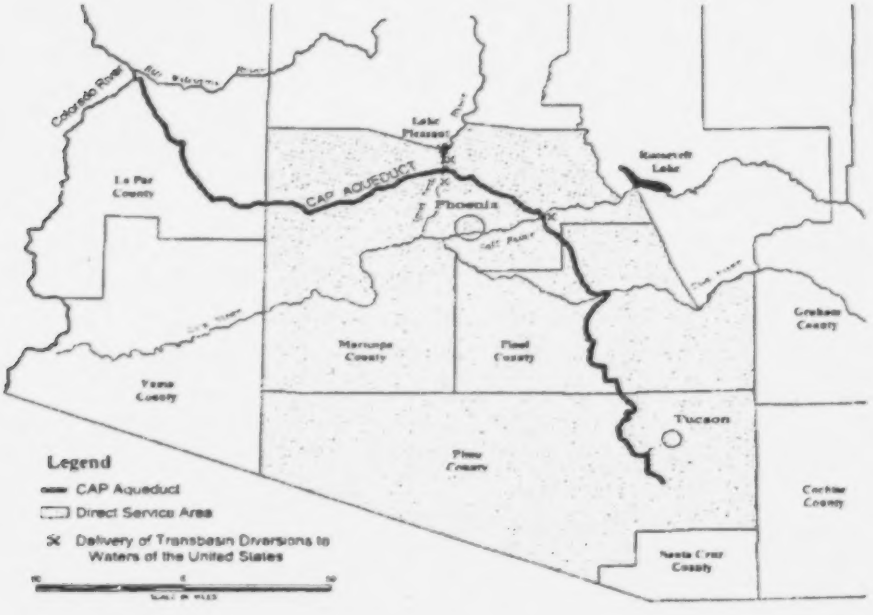
---

[8] The agencies that comprise the State Contractors are the following: Alameda County Flood Control and Water Conservation District, Zone 7, Alameda County Water District, Antelope Valley-East Kern Water Agency, Casitas Municipal Water District, Castaic Lake Water Agency, Central Coast Water Authority, City of Yuba City, Coachella Valley Water District, Count of Kings, Crestline-Lake Arrowhead Water Agency, Desert Water Agency, Dudley Ridge Water District, Empire-West Side Irrigation District, Kern County Water Agency, Littlerock Creek Irrigation District, Metropolitan Water District of Southern California, Mojave Water Agency, Napa County Flood Control and Water Conservation District, Oak Flat Water District, Palmdale Water District, San Bernardino Valley Municipal Water District, San Gabriel Valley Municipal Water District, San Gorgonio Pass Water Agency, San Luis Obispo County Flood Control and Water Conservation District, Santa Clara Valley Water District, Solano County Water Agency, and Tulare Lake Basin Water Storage District.

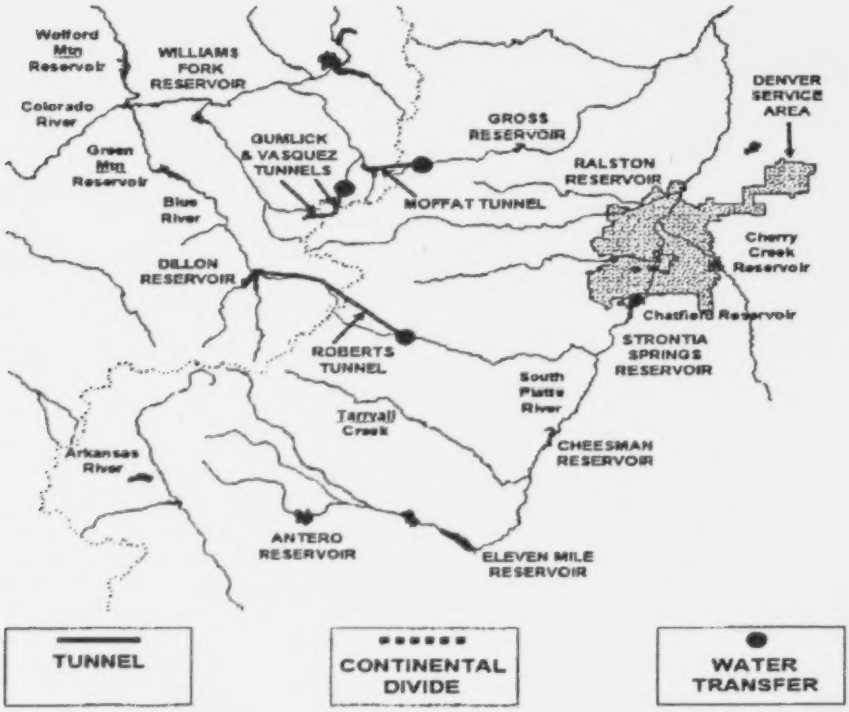
The Metropolitan Water District of Southern California ("Metro"),[9] a public entity made up of 26 member public agencies, imports water from the Colorado River through the Colorado River Aqueduct and from northern California through the California Aqueduct, as shown in the map below. Metro serves water to approximately 18 million people in a 5,200 square mile service area that includes Los Angeles, Orange, San Diego, Riverside, and Ventura counties. In fiscal year 2005-06 Metro delivered approximately 1.9 million acre feet of water, the equivalent of over 619 billion gallons.

[9] Metro is a member of the National Water Resources Association, Association of California Water Agencies, the State Water Contractors, and the Western Urban Water Coalition.

The Central Arizona Project ("CAP"), operated by the Central Arizona Water Conservation District, is a 336-mile long water transfer system of pumping plants, concrete-lined canals, inverted siphons, tunnels and pipelines that annually moves about 489 billion gallons of Colorado River water from Lake Havasu on the Colorado River to central and southern Arizona. The CAP water supply represents Arizona's largest renewable water supply; it serves municipal and industrial customers, non-Indian agricultural users and Indian communities. The service area of the CAP encompasses 80 percent of Arizona's water users, including the Phoenix and Tucson metropolitan areas. There are at least three operational points on the CAP system that release Colorado River water into other waters of the United States, as depicted below.



The City and County of Denver acting by and through its Board of Water Commissioners ("Denver Water") provides an average of 65 billion gallons per year of potable, raw and recycled water to approximately 1.2 million people in the Denver metro area. Denver Water diverts its supplies from 42 streams and numerous smaller tributaries and transfers it via two pump stations, 77 miles of canals, tunnels, siphons, and four trans-mountain tunnels. Water is stored in 13 reservoirs, with a combined storage capability of over 221 billion gallons.

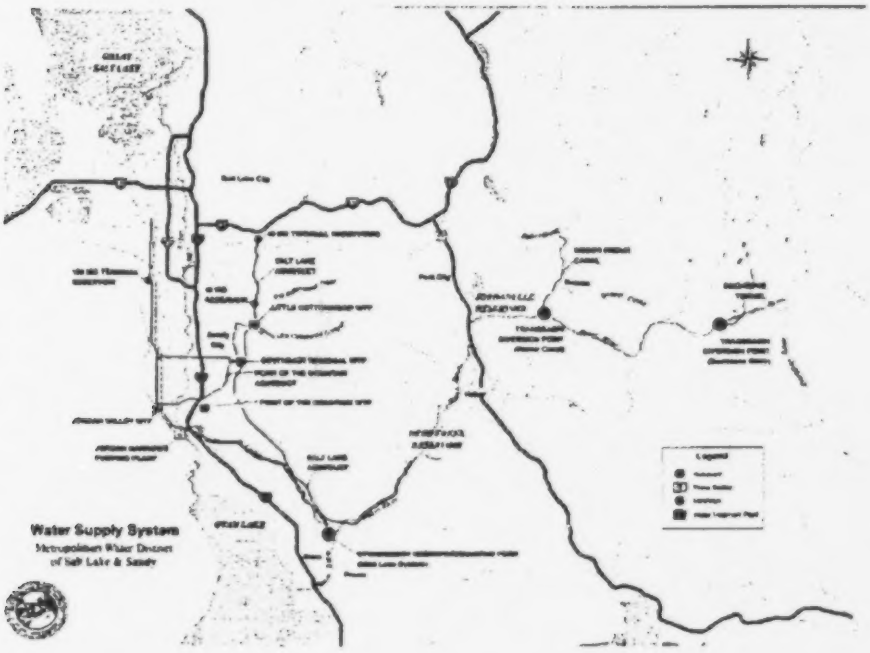


The U.S. Bureau of Reclamation's Colorado-Big Thompson ("C-BT") Project, operated by the Northern Colorado Water Conservancy District, conveys an average of 74 billion gallons per year through the Rocky Mountains and the Continental Divide to irrigate over 693,000 acres and supply approximately 750,000 people in 31 cities and towns and 16 water districts.[10] The C-BT Project diverts water from four source lakes, reservoirs, and streams, and conveys that water by gravity and three pump stations through two tunnels and nine canals into seventeen different streams, rivers, lakes and reservoirs.[11]

[10] The Municipal Subdistrict of the Northern Colorado Water Conservancy District operates the Windy Gap transbasin diversion project that is designed to provide approximately 16 billion gallons of water per year on average for municipal/industrial use.

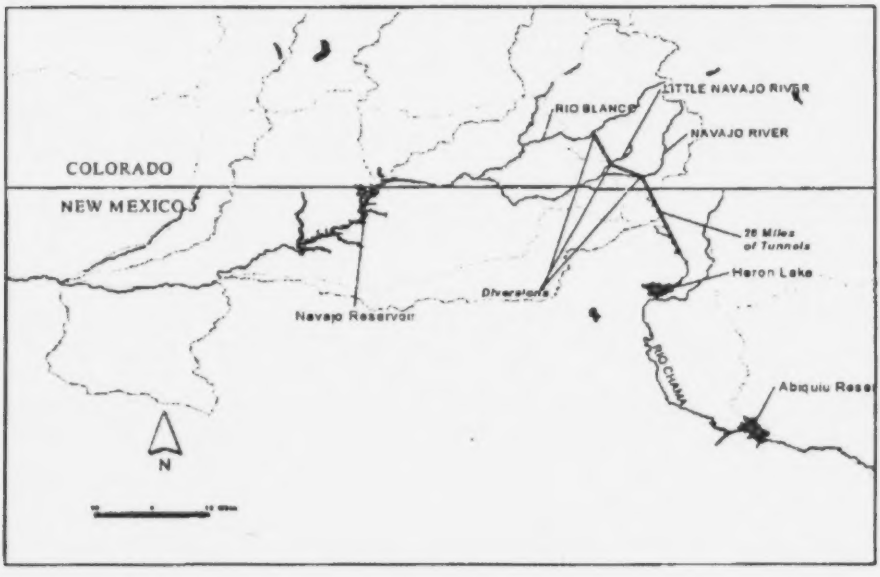
[11] Although the C-BT Project is the largest transbasin diversion in Colorado, it is not unusually complex in comparison to other western systems.

Metropolitan Water District of Salt Lake & Sandy, Utah ("District") provides supplemental water that makes up a portion of the supply for an estimated 400,000 people in the Salt Lake Valley. The District is the largest subscriber of water from the Provo River Project, a U.S. Bureau of Reclamation project completed between the 1930s and 1950s, and the second largest subscriber of water from the Bonneville Unit of the Central Utah Project, a U.S. Bureau of Reclamation project. The Provo River Project includes the Duchesne Tunnel, a 388 million gallons per day ("MGD") capacity tunnel that transfers water from the Duchesne River to the Provo River, and the Weber-Provo Canal, a 646 MGD capacity canal that transfers water from the Weber River to the Provo River. The Bonneville Unit of the Central Utah Project is serving the needs of a growing population in large part through a trans-basin diversion of water from tributaries of the Duchesne River. Approximately half of Metro's water supply depends upon trans-basin diversions.



Congress authorized construction of the San Juan-Chama Project in 1956. The Project imports water from the Colorado River Basin into the Rio Grande Basin, and consists of three diversions in Southern Colorado that divert water from tributaries of the San Juan River, itself a tributary of the Colorado River, through a series of tunnels beneath the Continental Divide to the Rio Chama Basin in New Mexico. The Project imports about 35 billion gallons of water annually.

The Albuquerque Bernalillo County Water Utility Authority ("Authority") is the largest San Juan-Chama Contractor and receives approximately 16 billion gallons per year. This water is the key to the Albuquerque area's water future by using surface water to replenish ground water depletion. Currently, the Authority is constructing the $375 million Drinking Water Project to transition use from the depleted aquifer to surface supplies. San Juan-Chama water will constitute 90 percent of Albuquerque's supply when the project comes on-line in 2008.



SUMMARY OF ARGUMENT

In *South Fla. Water Mgmt. Dist. v. Miccosukee Tribe of Indians*, 541 U.S. 95, 108-09 (2004), this Court recognized that the imposition of NPDES permit requirements on water transfers from one waterbody to another is a nationally important issue of particular concern to the West:

> If we read the Clean Water Act to require an NPDES permit for every engineered diversion of one navigable water into another, thousands of new permits might have to be issued, particularly by western states, whose water supply networks often rely on engineered transfers among various natural water bodies. See Brief for Colorado et al. as *Amici Curiae*. Many of those diversions might also require expensive treatment to meet water quality criteria. It may be that construing the NPDES program to cover such transfers would therefore raise the costs of water distribution prohibitively, and violate Congress' specific instruction that "the authority of each State to allocate quantities of water within its jurisdiction shall not be superseded, abrogated or otherwise impaired" by the Act. § 1251(g).

Under the holding of the Second Circuit in *Catskill II*, at each point where a ditch, canal, tunnel, or pipeline introduces water to a stream or reservoir for subsequent use, an NPDES permit would be required, 451 F.3d at 84-85, automatically subjecting the transfer to the effluent limitations of the Act. This extension of the NPDES Program would supersede, abrogate, or impair the States' ability to meet the unique and varied needs of their residents and to meet their legal obligations to other States under interstate water compacts and apportionments, contrary to the established federal-state framework of deference to State water allocations. *See* Brief for Colorado et al. as *Amici Curiae* at II.A. In addition, many

water rights owners – including *Amici* – would face an impossible choice: constructing prohibitively expensive facilities to meet NPDES requirements ordinarily applicable to wastewater dischargers or forfeiting part or all of their water rights. Either way, essential water will not be available for existing beneficial uses, contrary to Congress' specific directive in the Act.

ARGUMENT

The issue before the court is nationally important. The Second Circuit's decision to extend NPDES permitting requirements to water transfers could have broad impacts nationwide on residents and water users who rely on water transfers every day, particularly the more than 60 million residents of the arid West. Furthermore, the decision contributes to the uncertainty following this Court's ruling in *Miccosukee, supra*, as the Brief for Colorado et al. points out at I.A. That uncertainty inhibits *Amici's* ability to meet the essential water needs of the West.

In § 1251(g), Congress stated that the Act shall not be "construed to supersede or abrogate rights to quantities of water which have been established by any State." 33 U.S.C. § 1251(g) (2006). The States of Colorado et al. argue that Congress expressed its clear intent to preserve the established federal-state framework to defer to State water allocation law and specific State water allocations while recognizing the States' authority to address any related water quality issues pursuant to State law. *See* Brief for Colorado et al. at II.A. *Amici* agree, and explain below why extending NPDES permitting requirements to water transfers – as the Second Circuit has held – would produce a contrary result.

REQUIRING NPDES PERMITS FOR WATER TRANSFERS WOULD SUPERSEDE OR ABROGATE STATE WATER ALLOCATIONS BECAUSE PERMIT CONDITIONS WOULD EFFECTIVELY PROHIBIT THE FULL EXERCISE OF MANY STATE WATER RIGHTS.

In *Miccosukee*, the Supreme Court postulated that general permits might ameliorate the impact of extending the NPDES program to water transfers. 541 U.S. at 108-09. Unfortunately, however, general permits would provide no relief to water rights owners, such as *Amici*. All NPDES permits – general as well as individual permits – must include limitations to comply with water quality standards. 33 U.S.C. §§ 1311(b)(1)(C), 1313(e)(3)(A). In addition, "[n]o permit may be issued . . . [w]hen the conditions of the permit do not provide for compliance with the applicable requirements of the CWA, or regulations promulgated under the CWA." 40 C.F.R. § 122.4(d) (2006). Moreover, all NPDES permits, no matter how simplified the administrative process, are subject to antidegradation and best management practices requirements of the Act. If required to operate under NPDES permits, many water rights owners would have no alternative but to curtail their transfers because treatment facilities required to meet effluent discharge limits of the Act would be impractical and cost prohibitive, if not impossible, to construct treatment facilities.

A. WATER QUALITY STANDARDS

The Second Circuit concluded that water transfers constitute discharges from a point source. *Catskill II*, 451 F.3d at 84-85. If a discharge merely has the "potential to cause . . . an excursion above any State water quality standard," its NPDES permit must contain conditions to control all contributing pollutants. 40 C.F.R. § 122.44(d)(1)(i); *see*

also Committee to Save Mokelumne River v. E. Bay Mun. Util. Dist., 13 F.3d 305, 309 (9th Cir. 1993) ("The Act does not impose liability only where a point source discharge creates a net increase in the level of pollution. Rather, the Act categorically prohibits any discharge of a pollutant from a point source without a permit."). Thus, an NPDES permit must contain conditions that limit the amount of constituents delivered to the receiving waters, regardless of whether standards are, in fact, exceeded or whether the transfer is a significant potential cause of an exceedance.

Water quality almost inevitably varies between basins. Movement of water from one basin to another could therefore be subject to permit requirements even though the transferor has no ability to control naturally occurring or ubiquitous parameters. The only sure way an operator of a water transfer could control the introduction of different constituents into receiving waters would be to transfer no water at all.

For example, Colorado has adopted water quality standards for thirty-six different naturally-occurring parameters, including suspended solids and temperature, 5 COLO. CODE REGS. § 1002-31.16 (2005), which are influenced by snowmelt, rain runoff, and reservoir storage. Water quality standards also apply to numerous metals commonly present downstream from Colorado's mineralized mountains. *Id.* Eighty percent of the precipitation in the western states falls as snow. Runoff from snowmelt and storm events naturally contains elevated levels of total suspended solids, i.e. particles of soil and sediment, and turbidity, i.e. muddy water, from erosion caused by rapid runoff and accompanying high stream flows. The dramatic topography of the west – which extends from 280 feet below sea level to over 14,494 feet above sea level – is, of course, the result of such natural erosive processes.

Water conveyances typically are open canals and ditches and therefore receive regulated constituents directly from natural erosion. The source water itself, such as the headwaters of the Colorado River, may be naturally high in total dissolved solids such as salts as a result of its passage through saline geological formations and inflows from brackish hot springs. Although suspended solids and turbidity conveyed into a stream or open ditch may eventually settle out downstream, their temporary presence could contribute to loadings in the receiving waters, triggering regulatory consequences.

B. THE IMPACT ON WATER TRANSFERS

To avoid the potential to cause an excursion above the water quality standards of the receiving waterbody during spring runoff or following a thunderstorm, a single operator of a water transfer might have to expend hundreds of millions of dollars to construct one or more treatment facilities or implement best management practices ("BMPs")[12] to reduce the presence of even naturally occurring constituents. Each facility would be required to treat peak flows – which might occur just one or two days a year during spring snowmelt – in order to match the water quality of receiving waters. Further, expensive treatment plants would operate for only a few weeks or months because water is usually available only during snowmelt (50 percent of mountain stream flow occurs in just three months: May, June and July).

---

[12] Best management practices are methods and practices, including structural and nonstructural controls and operation and maintenance procedures, applied before, during, or after pollution-producing activities to reduce or eliminate the introduction of pollutants into receiving waters. *See, e.g.*, 40 C.F.R. § 130.2(m).

As one example, the C-BT Project transfers water from the Colorado River and delivers it through a tunnel under the Continental Divide for municipal, agricultural, and other uses in northeastern Colorado. The C-BT Project diverts water from four source lakes, reservoirs, and streams, and conveys that water by gravity and three pump stations through two tunnels and nine canals into and then out of at least thirteen different natural streams and rivers that are integral parts of the water transfer. Transfers average 203 MGD and peak at 358 MGD.[13] Even assuming that the necessary infrastructure could be put in place to handle spring peaking flows,[14] the potential capital cost to treat C-BT Project water *once* could exceed $315 million, *double* the initial cost of the entire C-BT Project.[15] Without the ability to treat peaking flows, the C-BT Project would face an uncertain future. Furthermore, the C-BT Project might have to treat essentially the same water 17 times in 17 different treatment plants, that is, at every point water is discharged to a lake, reservoir, or stream for later delivery. Such treatment would be prohibitively expensive, if even possible.

Many water transfers, such as the C-BT Project, traverse federal land, including national parks and national forests adjacent to wilderness areas. Given the

---

[13] For comparison, Metro, the nation's largest water agency, delivers 1,696 MGD.

[14] Treatment plants generally cannot handle large fluctuations in throughput; they require gradual changes. Therefore, most treatment plants have a forebay, i.e., a surge reservoir, to buffer variable flows.

[15] The Engineering Department of Denver Water, which transfers an average of 106 MGD – 39 billion gallons per year – to meet the needs of the Denver Metro area, estimates that the capital costs of treating water transfers for total suspended solids, metals, and phosphorus could be as much as $0.90 per gallon per day of capacity, depending on plant location and complexity of necessary treatment.

location of many transfers within or near pristine areas and the need for large sites for treatment facilities,[16] the NPDES approach may not be economically or technically feasible, politically acceptable, or environmentally desirable.

For the insurmountable practical reasons discussed above, requiring treatment of water transfers under the NPDES program would preclude many such transfers in part and even altogether. That result would effectively supersede or abrogate State-allocated water rights, contrary to Congress' directive in the Act.

C. ANTIDEGRADATION REQUIREMENTS

Where the quality of waters "exceed[s] levels necessary to support propagation of fish, shellfish, and wildlife and recreation in and on the water," antidegradation provisions apply so as to maintain and protect existing quality. 40 C.F.R. § 131.12(a)(2). Although transferred water is often suitable for beneficial use without treatment, water transfers would nonetheless be subject to this "no degradation" requirement if an NPDES permit were necessary.[17] Antidegradation requirements may apply where only one water quality constituent is better than the corresponding stream standard. The only practical way for many diverters to meet antidegradation requirements for high quality waters – typical in headwaters areas – might be to curtail transfers and forgo the use of a

[16] Possible site requirements to treat C-BT Project water, as described above, could exceed 240 acres per plant. The removal of constituents by the treatment plant produces a "sludge," which also requires appropriate disposal.

[17] A state may allow degradation only if it finds, following an analysis of alternatives, that "allowing lower water quality is necessary to accommodate important economic or social development in the areas where the waters are located." 40 C.F.R. § 131.12(a)(2).

portion of their State-allocated right to use a specific quantity of water.

D. BEST MANAGEMENT PRACTICES

NPDES permits may include numeric effluent limitations on the concentration of constituents as necessary to comply with water quality standards, 33 U.S.C. §§ 1311(b)(1)(C), 1313(e)(3)(A); 40 C.F.R. § 122.4(d), and may require BMPs, 33 U.S.C. § 1314(e). However, adherence to BMPs – generally simpler and less costly than the usual technological controls – does not automatically assure compliance with requirements of the CWA addressing water quality standards. *Northwest Indian Cemetery Protective Ass'n v. Peterson*, 764 F.2d 581, 589 (9th Cir. 1985), *rev'd on other grounds and remanded by Lyng v. Northwest Indian Cemetery Protective Ass'n*, 485 U.S. 439 (1988). It is also difficult to envision how many water providers could utilize BMPs in an economical manner to control source water quality without significantly curtailing their water transfers. Moreover, many of the BMPs would implicate land use controls over which the transferor would have little, if any, authority.

Thus, the NPDES program requirements would force many water transferors like *Amici* to forgo the full exercise of their State water allocations, as explained above.

CONCLUSION

There are few if any issues more critical to Western municipalities, water districts, canal and ditch companies, and individual farmers and ranchers than their continued ability to utilize scarce water resources when and where they are needed. Water supply in the West necessarily involves the collection, storage and transfer of water

through pipelines, tunnels, canals and natural waterbodies. Such water management activities have always been, and must remain, a State prerogative.

The Second Circuit's conclusion that the mere movement of natural waters from one stream or river to another constitutes a regulated addition of pollutants is clearly at odds with the specific Congressional directive not to supersede or abrogate state water allocations. *Amici* therefore urge this Court to (i) grant New York City's Petition for Certiorari and (ii) reverse the decision of the Second Circuit.

Respectfully submitted,

PETER D. NICHOLS*
PEGGY E. MONTAÑO
ROBERT V. TROUT
TROUT, RALEY, MONTAÑO,
WITWER & FREEMAN, P.C.
1120 Lincoln Street, Suite 1600
Denver, Colorado 80203
303-861-1963

Counsel for National Water Resources Association, Northern Colorado Water Conservancy District

**Counsel of Record for all Amici*